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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

DANIEL WALZ,
BY HIS GUARDIAN AD LITEM DANA P. WALZ,
Petitioner

v.

EGG HARBOR TOWNSHIP BOARD OF EDUCATION, ET AL.,
Respondents.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Daniel Walz was prohibited from distributing small gifts to his classmates at classroom holiday parties solely because the gifts included simple religious messages. Petitioner presents the following questions:

I. To what extent does the Supreme Court's First Amendment jurisprudence, particularly that dealing specifically with student speech, apply in the context of a public elementary school?

II. May student religious speech be censored solely because it is religious?

PARTIES TO THE PROCEEDING

The Petitioner in this matter is Daniel Walz, a minor individual. Daniel Walz proceeds by and through his next friend, Dana P. Walz, his mother.

The Respondents are Egg Harbor Township Board of Education and Dr. Leonard Kelpsh, who is sued in his official capacity as Superintendent of Egg Harbor Township Schools.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Daniel Walz respectfully petitions for a writ of certiorari to review the judgment of the Third Circuit Court of Appeals in *Daniel Walz v. Egg Harbor Township Board of Education, et al.*, 342 F.3d 271 (3d Cir. 2003).

OPINIONS BELOW

The decision of the Third Circuit Court of Appeals is reported at 342 F.3d 271 and is set out hereinafter as Appendix ("App.") A1. The district court's judgment, App. B1, is reported as *Daniel Walz v. Egg Harbor Township Board of Education, et al.*, 187 F.Supp.2d 232.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 28, 2003. See App. E3. Daniel Walz's petition for reconsideration, or in the alternative for rehearing en banc, under Third Circuit Rules 35 and 40, was filed on September 10, 2003 and denied on September 30, 2003. *See* App. D2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case is brought under the First Amendment to the United States Constitution, which provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech…"

This case also involves the Fourteenth Amendment to the United States Constitution, which provides in relevant part: "[N]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Nature of the Case

Petitioner, Daniel Walz, by and through his guardian ad litem, Dana P. Walz, brought this action under the Civil Rights Act, 42 U.S.C. § 1983, challenging Respondents' deprivations, under color of state law, of his federal constitutional rights to free speech, free exercise of religion, and equal protection pursuant to the First and Fourteenth Amendments to the United States Constitution.

B. The Facts

Daniel Walz was a pre-kindergarten student in the spring of 1998. 342 F.3d at 273; App. A2. Several times a year, his class held seasonal parties that typically included snacks, games, activities, and an exchange of small gifts among students. *Id.* Although students' parents were generally encouraged to donate small gift items to the local Parent Teacher Organization (PTO) for distribution at the parties, some students usually brought their small gifts to the party and gave them to their classmates directly. *Id*; 187 F.Supp.2d at 236, 239; App. B8, B14.

Just before the Easter holiday in 1998, Daniel's class held a seasonal party. 342 F.3d at 273; App. A2. During this party, Daniel distributed pencils to his classmates that bore the message, "Jesus [heart symbol] The Little Children." *Id.*; App. A2-3. When Daniel's teacher noticed the imprint on the pencils, she confiscated them and brought them to the attention of the school principal. *Id.*; A3. The principal contacted Respondent Kelpsh, the school

superintendent, who determined that Daniel would not be permitted to distribute the pencils because of the possibility that some children and their parents might perceive the religious message as being endorsed by the school. *Id.*

Six months after the party, Respondent Egg Harbor Board of Education adopted a written policy providing, in part, that "no religious belief or non-belief shall be promoted in the regular curriculum or in district-sponsored courses, programs or activities, and none shall be disparaged." *Id.* The policy further stated that religion could be acknowledged in the course of school activities "if presented in an objective manner and as a traditional part of the culture and religious heritage of the particular holiday." *Id.* The school also maintained an unwritten policy prohibiting students from distributing items with political, commercial, or religious references in class during school hours. *Id.*

In December of 1998, Daniel's kindergarten class held a seasonal holiday party. *Id.* At this party, Daniel sought to distribute candy canes attached to copies of a religious story entitled "A Candy Maker's Witness."[1] *Id.*; App. A3-4.

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[1] The story read:

"A Candymaker in Indiana wanted to make a candy that would be a witness, so he made the Christmas Candy cane. He incorporated several symbols for the birth, ministry, and death of Jesus Christ.

He began with a stick of pure white, hard candy. White to symbolize the Virgin Birth and the sinless nature of Jesus, and hard to symbolize the Solid Rock, the foundation of the Church, and firmness of the promises of God.

The candymaker made the candy in the form of a "J" to represent the precious name of Jesus, who came to earth as our Savior. It could also represent the staff of the "Good Shepherd" with which He reaches down into the ditches of the world to lift out the fallen lambs who, like all sheep, have gone astray.

Thinking that the candy was somewhat plain, the candymaker stained it with red stripes. He used three small stripes to show the stripes

When Dana P. Walz, Daniel's mother, contacted school officials to seek permission for Daniel to distribute these items to his classmates at the party, she was informed that he would only be allowed to distribute them before school, during recess, or after school. *Id.* at 274; App. A5. She was told that he would not be permitted to distribute them during the classroom party. *Id.*

In December of 1999, Daniel, who was now a first-grade student, attempted to distribute the same candy canes and story to his classmates during the holiday party, but school officials again prohibited him from doing so. *Id.* Daniel was allowed to distribute his gifts in the hallways, at recess, or after school, but not at the party where others were permitted to distribute "generic" gifts. *Id.*; A5-6. To this day, Daniel is still prohibited from distributing gifts with religious messages to his classmates at in-classroom holiday parties where others are permitted to distribute "generic" gifts. Daniel is now in the 5th grade.

C. The District Court's Opinion

On May 2, 2000, Daniel Walz, through his guardian ad litem, Dana P. Walz, filed a complaint against the Board of Education and Superintendent Kelpsh, in his official

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of the scouring [sic] Jesus received by which we are healed. The large red stripe was for the blood shed by Christ on the cross so that we could have the promise of eternal life.

Unfortunately, the candy became known as a Candy Cane [sic] a meaningless decoration seen at Christmas time. But the meaning is still there for those who "have eyes to see and ears to hear." I pray that this symbol will again be used to witness to The Wonder of Jesus and His Great Love that came down at Christmas and remains the ultimate and dominant force in the universe today."

342 F.3d 271, 273-74.

capacity, invoking federal-question jurisdiction under 28 U.S.C. § 1331. 187 F.Supp.2d at 236; App. B9. In the complaint, Daniel alleged that school officials' censorship of his expression based on his religious viewpoint violated his rights under the First and Fourteenth Amendments to the United States Constitution. *Id.* The complaint also raised parallel claims under State law. *Id.*

The parties submitted cross-motions for summary judgment. *Id.* On February 11, 2002, the district court entered its order denying Daniel's motion and granting the school officials' motion. *Id.*; App. B25.

The court began by noting that there was no dispute that the classrooms where Daniel attempted to distribute his gifts were non-public forums. *Id.* at 238; App. B11. The court then recognized that speech in a non-public forum may be subject to time, place, and manner restrictions that are viewpoint-neutral and reasonably related to a legitimate governmental purpose. *Id.* (*quoting C. H. v. Oliva*, 990 F.Supp. 341, 352 (D.N.J. 1997), *aff'd in part, rev'd in part*, 226 F.3d 198 (3d Cir. 2000), *cert. denied*, 533 U.S. 915 (2001)); App. B13. The court also recited the rule from *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266 (1988), that educators may exercise editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns. *Id.* at 239 (*quoting Oliva, supra*); App. B14.

The district court rejected Daniel's argument that the speech restriction imposed by school officials was viewpoint-based, despite the fact that the restriction required Daniel to distribute his gifts in the hallways or after school because of their religious messages, while allowing Daniel's classmates to distribute "generic" gifts at the classroom parties. *Id.* at 239; App. B14. The court found instead that

the "minor" restriction was "viewpoint neutral and extremely reasonable." *Id.*; App. B14.

The court based this finding of viewpoint neutrality on the curious reasoning of the district court in *Oliva* that "[v]iewpoint neutral ... does not mean that any regulation that relates to the viewpoint of the speech is prohibited, but rather that the regulation must be based solely upon larger pedagogical concerns rather than a particular point of view." *Id.* (*quoting Oliva*, *supra*, at 353); App. B14-15. The district court below bolstered its conclusion that the restriction on religious messages was viewpoint neutral by pointing to the fact that the school had not opened a forum for the exchange of views about a subject. *Id.*; App. B15.

Finally, the court found that the restriction was "reasonably related to the school's pedagogical concerns." *Id.* at 240; App. B17. It is not clear from the opinion, however, what specific pedagogical concerns the court found to justify the restriction.

D. The Third Circuit's Opinion

The Third Circuit affirmed the district court's decision. 342 F.3d at 281; App. A20. While the court's analysis of the constitutional issues is rather convoluted, it begins with the principle that elementary schools are responsible for teaching young children basic social, behavioral, and academic lessons in a structured environment and that "age and context" are key to an examination of speech restrictions in the elementary school context. *Id.* at 275-76; App. A8. The court relied heavily on this proposition throughout the opinion to support its reasoning in developing a nearly non-existent bar for elementary school officials to pass in justifying restrictions on students' religious expression.

The court stated broadly that "[t]o require a school to permit the promotion of a specific message would infringe upon a school's legitimate area of control." *Id.* at 277 (*citing Hazelwood*, 484 U.S. at 271); App. A11. In an elementary school classroom, the court explained, "the line between school-endorsed speech and merely allowable speech is blurred" for students and parents alike. *Id.* at 277 (*citing Edwards v. Aguillard*, 482 U.S. 578, 584 (1987)); App. A12. These considerations led the Third Circuit to announce the following rule: "[W]here an elementary school's purpose in restricting student speech within an organized and structured educational activity is reasonably directed towards preserving its educational goals, we will ordinarily defer to the school's judgment." *Id.* at 277-78; App. A13.

In an elementary school setting, explained the court, the "appropriateness" of student expression depends on the type of speech, the age of the audience, the school's control over the activity in which the expression occurs, and whether the school has solicited individual views from students. *Id.* at 278; App. A13. In the context of an organized curricular activity, the Third Circuit held, an elementary school may properly restrict "student speech promoting a specific message." *Id.*; App. A14.

The court then went on to make a curious distinction between student expression that implicates religion "out of personal observance" and student expression that is an "outward promotion" of religion, apparently considering the former to be deserving of greater First Amendment protection than the latter. *Id.* at 278-79; App. A14-15. The court did recognize that elementary school students retain certain First Amendment rights of expression, stating that "where the school solicits individual views in a classroom assignment, students should be able to respond in a non-disruptive manner." *Id.* at 280; App. A18-19.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE THE SPLIT BETWEEN THE THIRD AND SEVENTH CIRCUITS AS TO WHETHER OR NOT PUBLIC ELEMENTARY SCHOOL OFFICIALS MAY CENSOR STUDENT EXPRESSION SOLELY BECAUSE OF ITS RELIGIOUS VIEWPOINT.

In *Hedges v. Wauconda Community Unit School District*, the Seventh Circuit clearly stated that "no arm of government may discriminate against religious speech when speech on other subjects is permitted in the same place at the same time." 9 F.3d 1295, 1297 (7th Cir. 1993)(*citing Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 385 (1993)). The court emphasized that the prohibition of viewpoint-based discrimination applies with even greater force when the speech in question is religious in nature because "the free exercise clause of the first amendment singles [religious speech] out for protection." *Id.* at 1298.

While the policy the Seventh Circuit was addressing in *Hedges* governed both elementary and junior high students, the Seventh Circuit applied this reasoning directly to the elementary school context in *Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7th Cir. 1996), *cert. denied*, 520 U.S. 1156 (1997).

> The "marketplace of ideas," an important theme in the high school student expression cases, is a less appropriate description of an elementary school, where children are just beginning to acquire the means of expression. Grammar schools are more about learning, including learning to sit still and be polite, than about robust debate. *And yet we have held that religious speech cannot be suppressed solely because it is*

> *religious (as opposed to religious and disruptive or hurtful, etc.), a principle that makes sense in the elementary school environment.*

Muller, 98 F.3d at 1538 (*citing Hedges*, *supra*)(emphasis added)(footnotes omitted). Later the court noted that the child's "right not to have his expression suppressed solely because it is religious" was vindicated in the district court. *Id.* at 1545.

The Seventh Circuit in *Muller* pointed out that suppression of religious speech solely because it is religious is not only prohibited because it constitutes viewpoint-based discrimination but also because such restrictions are "per se unreasonable." *Id.* at 1543-44. Thus, in the Seventh Circuit's view, even under the lenient *Hazelwood* standard for evaluating student speech restrictions, a policy restricting religious expression solely because it is religious can never be acceptable.

This understanding of First Amendment law, which Petitioner submits is consistent with this Court's decisions, is in stark contrast to the view that prevailed in the Third Circuit below. It is undisputed that the only reason Respondents refused to allow Daniel Walz to distribute his gifts was because they included religious messages. 342 F.3d at 273-75; App. A3. It is also undisputed that Daniel's classmates were permitted to distribute "generic" gifts inside the classroom at the same time that Daniel was prohibited from distributing his gifts. *Id.*; App. A5-6. Nevertheless, the Third Circuit upheld Respondents' actions and the policy supporting them. The Third Circuit opinion does not clearly explain its reasoning in determining that this type of viewpoint-based discrimination is permissible.

Petitioner respectfully submits that this Court should grant review to resolve this dramatic split between the Third

and Seventh Circuits as to whether religious expression may be censored solely because it is religious in the public elementary school context. Until this Court provides guidance on this issue, lower federal courts will continue to chart their own uncertain courses in response to the increase in litigation likely to be sparked by the uncertainty that now surrounds this issue. Some courts will likely follow the Seventh Circuit's approach while others will choose to adopt the Third Circuit's framework, which represents a dramatic departure from this Court's First Amendment jurisprudence.

II. THE COURT SHOULD GRANT REVIEW TO RESOLVE CONSIDERABLE CONFUSION AS TO THE APPROPRIATE FRAMEWORK FOR REVIEW OF STUDENT SPEECH RESTRICTIONS IN THE PUBLIC ELEMENTARY SCHOOL CONTEXT.

There is a considerable amount of confusion among lower federal courts as to how this Court's student speech jurisprudence should be applied in the context of a public elementary school. While this Court has, on at least three occasions, squarely addressed the constitutionality of school officials' restrictions of student speech in the context of public secondary schools and has created a recognizable framework for analysis of such restrictions by lower courts, the Court has yet to clarify the extent to which this framework is applicable in the public elementary school context. *See Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

In the face of the vacuum created by a lack of clear Supreme Court guidance, the Third Circuit and U.S District Court for the District of New Jersey have relied upon dicta from this Court's opinion in *Edwards* in assuming that a

much greater degree of speech restriction is permissible where younger students are concerned. 187 F.Supp.2d at 240 (citing *Edwards* for proposition that age and grade level of child should be considered by courts in determining whether speech restrictions are appropriate); App. B17; 342 F.3d at 275-76 (citing *Edwards* for proposition that in elementary school classroom, line between school-endorsed speech and allowable speech is blurred); App. A8. *Edwards*, of course, did not address student speech restrictions at all, but rather addressed the constitutionality of a statute requiring schools to teach creation science along with the evolution theory. *See Edwards, supra.*

In another 2003 Third Circuit decision, the court stated that the significance of age in the analysis of student free speech claims had "called into question the appropriateness of employing the *Tinker* framework to assess the constitutionality of restrictions on the expression of elementary school students." *Walker-Serrano v. Leonard*, 325 F.3d 412, 416 (3d Cir. 2003). The court observed that while no other court of appeals had ruled specifically on the application of *Tinker* in this context, district courts considering the issue had generally applied the *Tinker* framework in considering elementary students' First Amendment claims. *Id.* (*citing Johnston-Loehner v. O'Brien*, 859 F.Supp. 575 (M.D. Fla. 1994); *Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F.Supp. 1459 (C.D. Cal. 1993). In *Walker-Serrano*, as in *Walz*, the Third Circuit resolved the uncertainty surrounding this issue in a way that virtually stripped elementary school students of all meaningful First Amendment protection.

> In any event, if third graders enjoy rights under *Tinker*, those rights will necessarily be very limited. Elementary school officials will undoubtedly be able to regulate much—perhaps most—of the speech that is protected in higher grades. When

> officials have a legitimate educational reason—whether grounded on the need to preserve order, to facilitate learning or social development, or to protect the interests of other students—they may ordinarily regulate public elementary school children's speech.

Id. at 417-18.

The Seventh Circuit has been less willing to depart entirely from the *Tinker* line of cases in evaluating speech restrictions at the elementary school level, while confessing its uncertainty as to the appropriate analysis.

> Especially considering the important role age plays in student speech cases, ... it is unlikely that *Tinker* and its progeny apply to public elementary (or preschool) students. But because the Supreme Court has not directly decided this question, the following analysis will assume that grade schoolers partake in certain of the speech rights set out in the *Tinker* line of cases.

Muller, 98 F.3d at 1539. The court in that case concluded that the traditional prohibition of viewpoint-based speech restrictions is not "hard and fast" with elementary schools but, rather, is only as extensive as the special characteristics of the school environment permit. *Id.* at 1542. However, the court was careful to affirm the principle that speech could not be suppressed or discriminated against solely because it is religious. *Id.* at 1544.

A reading of the concurring opinions in *Muller* reveals the confusion among the members of the three-judge panel regarding the applicability of this Court's student speech jurisprudence to the public elementary school context. Judge

Eschbach concurred for the sole purpose of stating his view that it was unnecessary for the court to speculate that the free speech rights elaborated in the *Tinker* line of cases do not extend to elementary school students. *Id.* at 1545 (Eschbach, concurring). Judge Rovner expressly disagreed with the suggestion that the *Tinker* standard was inapplicable to elementary school students. *Id.* at 1546 (Rovner, concurring). Judge Rovner pointed out that the *Tinker* analysis is to be applied "in light of the special characteristics of the school environment," which allows for some consideration of the younger age of the students. *Id.*[2]

At least one other federal court of appeals has similarly indicated a sense of uncertainty as to how to evaluate student speech restrictions in the elementary school context. *See Sonkowsky v. Board of Educ.*, 327 F.3d 675, 677 (8th Cir. 2003)("assuming" that fourth-grader has right to free expression at school).

The Fourth Circuit, on the other hand, recently applied the *Tinker* framework to a sixth-grader's First Amendment claims without pausing to express any doubt as to whether the *Tinker* analysis was appropriate in light of the student's age. *Newsom v. Albemarle County Sch. Bd.*, 2003 U.S. App. LEXIS 24295, *19 (4th Cir. 2003)("[*T*]*inker* is the most relevant of the three Supreme Court cases concerning school speech and sets forth the legal framework that we will use in our overbreadth analysis.").

Petitioner respectfully submits that unless and until this Court considers and resolves a case involving a free speech claim raised by an elementary school student, lower federal

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[2] Interestingly, the Third Circuit made this same observation in *Walker-Serrano*. 325 F.3d at 417 ("That elementary schools require a greater degree of control, or a different kind of control, over students might be accommodated within the *Tinker* analysis.").

courts will continue to stumble in the dark in attempting to resolve such claims.

III. THE COURT SHOULD GRANT REVIEW BECAUSE THE THIRD CIRCUIT'S OPINION BELOW REPRESENTS A SUBSTANTIAL DEPARTURE FROM AND/OR UNWARRANTED EXTENSION OF THIS COURT'S FIRST AMENDMENT JURISPRUDENCE.

The Third Circuit's opinion in the instant case is a perfect example of the type of confusion and inconsistency that will characterize lower courts' decisions in this area until clarity is brought by a reasoned opinion of this Court. The opinion follows no identifiable framework. Rather than building its decision upon the firm foundation that this Court has laid for the analysis of student speech claims under the First Amendment, the panel chose to depart entirely from that foundation and to instead create an entirely new set of standards for student speech in the elementary school context. In this case, the application of the new standard invented by the Third Circuit panel yielded a result that is in direct conflict with numerous decisions in which this Court has consistently held that government officials may not discriminate against speech on the basis of the speaker's viewpoint. *See, e.g. Lamb's Chapel, supra*; *Rosenberger v. Rector of Univ. of Virginia*, 515 U.S. 819 (1995); *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985).

The rule that the Third Circuit appears to establish is that "where an elementary school's purpose in restricting student speech within an organized and structured educational activity is reasonably directed towards preserving its educational goals, [the court] will ordinarily defer to the

school's judgment." 342 F.3d at 278; App. A13. A charitable reading of this statement suggests that the panel has attempted to fit Daniel's expression within the rule of *Hazelwood*— that a school may regulate school-sponsored speech (speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern.

But the Third Circuit does not explain in its opinion how or why it reached the unstated conclusions that: (a) Daniel's speech was in the context of a "school-sponsored expressive activity" within the meaning of *Hazelwood*,[3] and (b) a reasonable observer would have perceived Daniel's message as the school's own. In fact, the Third Circuit did not even use the all-important phrase, "school-sponsored expressive activity," but instead sets a new precedent that brings elementary school students' expression within the *Hazelwood* rule whenever it occurs within an "organized and structured educational activity." *Id.* It is difficult to conceive of *any* activity in the elementary school setting that could not be classified as such. This rule, then, is in tension with the court's later statement that students retain rights of expression where the school solicits individual views in a classroom assignment. 342 F.3d at 279; App. A15.

Petitioner respectfully submits that the Third Circuit's holding represents a dramatic, unwarranted extension of *Hazelwood*. If *Hazelwood* is construed to allow restrictions on any expressive activity in the classroom (because such activities are "organized and structured educational activities"), subject only to the requirement that such restrictions be reasonably related to legitimate pedagogical concerns, then it cannot be reconciled with *Tinker*. *Tinker* specifically addressed expressive activity (the wearing of

[3] The examples of "school-sponsored expressive activities" given in *Hazelwood* were limited to school-sponsored publications and theatrical productions. *Hazelwood* at 271.

armbands in that case) that occurred *in the classroom*. See *Tinker, supra.*

This Court also limited application of the lenient *Hazelwood* standard—that a speech restriction merely be "reasonably related to legitimate pedagogical concerns"—to speech that can reasonably be perceived to bear the school's imprimatur. *Hazelwood* at 271. But the Third Circuit's only mention of this factor comes in the last full paragraph of the opinion, and even then is merely stated in a conclusory fashion with no hint of explanation or analysis.[4] 342 F.3d at 280; App. A19. The Third Circuit's application of the *Hazelwood* standard absent a finding of the two prerequisite factors represents a substantial and illegitimate extension of *Hazelwood.*

Perhaps the most disturbing aspect of the Third Circuit's decision is the lack of any explanation as to how or why it concluded that school officials are entirely free to make viewpoint-based restrictions of student speech in the elementary school context. Neither *Hazelwood* nor any other Supreme Court precedent sanctions this practice. Rather, this Court has consistently stated that government officials may *not* engage in viewpoint-based discrimination against religious speech. *See, e.g Lamb's Chapel, supra*; *Rosenberger, supra*; *Good News Club, supra.* Moreover, at least one other Circuit Court has indicated that the Supreme Court's prohibition of viewpoint-based speech restrictions applies in the elementary school context, at least to the extent of precluding officials from censoring religious speech solely because it is religious. *See Muller, supra*, at 1543-44.

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[4] The opinion reads: "In the context of its classroom holiday parties, the school's restrictions on this expression were designed to prevent proselytizing speech that, if permitted, would be at cross-purposes with its educational goal and could appear to bear the school's seal of approval." 342 F.3d at 280 (*citing Hazelwood* at 273).

While the Third Circuit's decision to allow viewpoint-based speech restrictions signals the start of a new era in First Amendment law, the Third Circuit went a step further by not requiring any compelling interest to justify such a restriction. Ordinarily, where religious speech is involved, the government interest asserted to justify the restriction is the interest in avoiding an Establishment Clause violation. The Third Circuit panel, however, did not even consider whether allowing Daniel's expression at the classroom party would have implicated the school in an Establishment Clause violation, aside from its opaque, conclusory statements that "the line between school-endorsed speech and merely allowable speech is blurred" and that Daniel's message "could appear to bear the school's seal of approval." 342 F.3d at 277, 280; App. A11, A19.

In *Good News Club*, this Court noted that it remains unclear whether even a legitimate interest in avoiding an Establishment Clause violation can justify viewpoint discrimination. *Good News Club,* 533 U.S. at 113. This Court's holdings make it quite clear, however, that school officials' desire to avoid a mere *appearance* of endorsing religion is not a sufficient government interest to justify censorship of protected speech. The Court has routinely dismissed claims that censorship of religious expression is justified by the Establishment Clause where allowing the expression to occur would not actually violate that provision. *See Widmar v. Vincent*, 454 U.S. 263 at 272-73 and n. 13 (1981); *Lamb's Chapel*, 508 U.S. at 395; *Good News Club*, 533 U.S. at 113. Writing for the Court in *Good News Club*, Justice Thomas noted that the Court has not suggested that the impressionability of students is even relevant to the Establishment Clause issue when the school is not actually advancing religion. 533 U.S. at 116.

It is difficult to ascertain why the Third Circuit chose to disregard not only this Court's entire line of cases

concerning student speech, but even the Court's more basic jurisprudence regarding speech on government property. Even once the court below had completely sidestepped the established framework for student speech cases, forum analysis alone indicates that Respondents' actions were unconstitutional, as viewpoint-based discrimination is prohibited in any forum, including a non-public one. *See Cornelius, supra.*

Petitioner respectfully submits that the reasoning of the Third Circuit in this case went far beyond the bounds that this Court has set for lower courts' consideration of restrictions of speech on government property in general and student speech at public schools in particular. Petitioner respectfully submits that it is essential for this Court to review the Third Circuit's decision, inasmuch as it sets a precedent that is inconsistent with seminal decisions of this Court and results from a complete departure from the established framework for analysis of cases involving student speech and viewpoint-based speech restrictions.

IV. THE COURT SHOULD GRANT REVIEW BECAUSE THE THIRD CIRCUIT'S DECISION ESSENTIALLY ELIMINATES FIRST AMENDMENT RIGHTS OF FREE EXPRESSION FOR PUBLIC ELEMENTARY SCHOOL STUDENTS.

Petitioner respectfully submits that this case is particularly appropriate for consideration by this Court because it involves a question of exceptional importance—namely, whether elementary school students retain any meaningful First Amendment rights inside the elementary schoolhouse gate. The Third Circuit's decision establishes a precedent whereby the expression of elementary school students has lost virtually all First Amendment protection.

The Third Circuit's opinion states that students may properly express themselves when "the school has sought students' personal views," but that an elementary school "may properly restrict student speech promoting a specific message" in the context of an "organized curricular activity." 342 F.3d at 278; App. A13-14. In effect, the Third Circuit's rule is that elementary school students may "speak when spoken to." If a classroom party such as the one at which Daniel Walz sought to distribute gifts to his classmates constitutes an "organized curricular activity," then it is difficult to imagine any activity at an elementary school that is not an "organized curricular activity." The Third Circuit's opinion, thus, effectively creates a rule that elementary school students may not express any "specific message" at school except on the rare (if not purely theoretical) occasions when school officials explicitly inquire as to a given student's viewpoint on a particular matter.

Unwilling to stop with the creation of this draconian standard under which children are effectively told to "speak when spoken to," and even then only to respond to the question precisely, the Third Circuit goes so far as to indicate that it is "perhaps even unnecessary" for school officials to allow students to express their opinions to classmates in the school hallway after class or at recess. *Id.* at 280; App. A18. It is peculiar that the Third Circuit quotes the familiar statement:

> That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Id. (*quoting West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1948)). For then the court goes on to strip the "rights" of these young being trained for citizenship down to this slender reed: that "where the school solicits individual views in a classroom assignment, students should be able to respond in a non-disruptive manner." *Id.* at 280; App. A18-19. Petitioner respectfully submits that this Court's First Amendment jurisprudence indicates an intent to preserve a far more substantial right for our nation's young citizens. It is difficult to comprehend how the rule set forth by the Third Circuit does anything less than allow young minds to be "strangled" at their source.

If the Third Circuit's opinion provides scant breathing room for elementary school students' expression in general, it essentially delivers a knockout punch to students' *religious* expression. The opinion states:

> For a student in "show and tell" to pass around a Christmas ornament or a dreidel, and describe what the item means to him, may well be consistent with the activity's educational goals; likewise, a lesson that includes a mock debate invites individual student expression on the relevant topic. In those scenarios, the student speaker is expressing himself in the context of a school assignment or activity where the school has sought students' personal views. Nevertheless, in the context of an organized curricular activity, an elementary school may properly restrict student speech promoting a specific message.

Id. at 278 (footnotes omitted); App. A13-14. Based on this reasoning, the Third Circuit upheld the lower court's decision that school officials were justified in prohibiting

Daniel from distributing small gifts to his classmates at a classroom party, even though other children were permitted to distribute similar gifts, because Daniel's gifts included religious messages.

The court's assurance that students retain the right to at least respond to school officials' invitations to express their viewpoints is little more than a desert mirage. An equally divided Third Circuit, *en banc,* previously affirmed a decision upholding school officials' refusal to allow a first-grader to tell a "Bible story" in precisely the type of situation—the only type of situation—in which the panel below would apparently allow student religious expression to occur. In *C.H. v. Oliva*, the Third Circuit affirmed a district court holding that school officials could properly prohibit a first-grader from telling his classmates a story from a book entitled "The Beginner's Bible," even though his teacher had invited him to share a story of his own choosing as a reward for reaching a certain level of reading proficiency. 990 F.Supp. 341 (D.N.J. 1997), *aff'd in part* at 226 F.3d 198 (3d Cir. 2000), *cert. denied*, 533 U.S. 915 (2001). The teacher's sole objection to the story was that it was adapted from the Bible.[5]

Against the backdrop of *Oliva*, the Third Circuit's assurance that elementary school students retain at least a modicum of freedom to express their religious faith rings hollow. When one views the panel's decision in Daniel's case and the *Oliva* decision together, as lower courts in the Third Circuit must, it becomes apparent that elementary school students within the states comprising the Third Circuit may simply be prohibited from expressing their religious views, whether they are invited to speak to their classmates or do so on their own initiative.

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[5] Interestingly, the story was about Jacob and Esau, and it contained no mention of God, Jesus Christ, or even the Bible.

While the Third Circuit indicated a willingness to provide greater protection for student expression that "implicates" religion "if done out of personal observance," than for expression that constitutes "outward promotion" of religion, this aspect of the opinion cannot withstand careful examination. 342 F.3d at 278-79; App. A14. Putting aside for a moment the fact that there is no legal basis upon which school officials may prescribe a wholesale prohibition of students' "promotion" of their personal religious beliefs, the policy upheld by the court below does not appear to provide the protection for even "personal observances" of religion that the court would impute to it.

The policy upheld by the Third Circuit provides that "no religious belief or non-belief shall be promoted in the regular curriculum or in district-sponsored courses, programs or activities..." *Id.* at 273; App. A3. Under the policy, religion may be acknowledged in the course of school activities only "if presented in an objective manner and as a traditional part of the culture and religious heritage of the particular holiday." *Id.* Nothing in this policy would protect a student's right to wear a cross on a necklace, a practice of which the panel would apparently approve. *See id.* at 278-79 ("There is a marked difference between expression that symbolizes individual religious observance, such as wearing a cross on a necklace, and expression that proselytizes a particular view."); App. A14-15. This is because a student undoubtedly "promotes" Christianity by wearing a cross necklace, notwithstanding that the necklace is also a "personal observance" of religion.

While the policy would likely be unobjectionable if applied only to school officials and teachers, it has been applied, with the Third Circuit's approval, to preclude Daniel Walz from "promoting" his religion. The policy essentially applies the Establishment Clause's requirement of neutrality toward religion to *students*, prohibiting them from promoting

any religious belief as part of any district-sponsored activities, including classroom parties. Little need be said about the extent to which such a policy distorts the entire First Amendment. In the words of this Court, "[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 250 (1990).

The Third Circuit issued two other decisions this year that fail to recognize any meaningful protection for the First Amendment rights of elementary school students. In *Walker-Serrano v. Leonard*, the Third Circuit affirmed a district court's grant of summary judgment for school officials who denied a third-grader the right to circulate a petition to her classmates during recess. 325 F.3d 412 (3d Cir. 2003). The student sought, through the petition, to convince school officials that the third grade class did not wish to take a field trip to the circus because the students were concerned about the treatment of animals.[6] *Id.* at 414. In this case, the Third Circuit held that "[w]hen officials have a legitimate educational reason—whether grounded on the need to preserve order, to facilitate learning or social development, or to protect the interests of other students—they may ordinarily regulate public elementary school children's speech." *Id.* at 418. The court went on to find that there was "no evidence that [school officials] acted outside the permissible scope of their authority over third grade students, even if [the student's] petition caused no disruption." *Id.*

The Third Circuit also affirmed a grant of summary judgment for school officials in *S.G. v. Sayreville Board of*

[6] The actual petition read, "We 3rd grade kids don't want to go to the circus because they hurt animals. We want a better feild [sic] trip." *Walker-Serrano*, 325 F.3d at 414.

Education. 333 F.3d 417 (3d Cir. 2003). In that case, a kindergarten student was suspended for saying "I'm going to shoot you" to his friends as they played "cops 'n robbers" at recess. *Id.* The suspension was upheld despite the conspicuous absence of any showing that the statement constituted a true threat—a showing that surely could not have been made under the circumstances. The court stated that "the determination of what manner of speech is inappropriate properly rests with the school officials." *Id.* at 423.

Upon reading the Third Circuit's decisions in *Walz, Oliva, Walker-Serrano* and *S.G.* together, as lower courts in the Third Circuit must, it becomes apparent that elementary school students in the Third Circuit are permitted only such "rights" of expression as school officials may choose to give them and that these students' expression may be censored for any reason, including a viewpoint-based reason. Essentially, the Third Circuit has indicated that elementary school students are to be "seen and not heard."

The Third Circuit has invented a draconian new rule under which elementary school students' expression, particularly religious expression, enjoys no meaningful First Amendment protection. Petitioner respectfully submits that such an extreme precedent, affecting such a precious bundle of rights, warrants review by this Court.

CONCLUSION

The Third Circuit opinion in this case represents a dramatic and unwarranted departure from and extension of this Court's First Amendment jurisprudence. The court below has opened the door for public elementary school officials to engage in blatant viewpoint-discrimination by censoring religious expression, solely because it is religious, and has held the lenient *Hazelwood* standard applicable to

any student speech in any "organized curricular" activity. In so doing, the Third Circuit necessarily abolishes the *Tinker* framework in the context of public elementary schools and leaves elementary school students to cling to an anemic version of the First Amendment that will allow them only to "respond in a non-disruptive manner" when asked for their individual viewpoints. Petitioner submits that this inventive holding is too important to go unreviewed by this Court, especially in light of this Court's seminal opinions in this arena and the considered judgment of the Seventh Circuit, which all indicate that the Third Circuit has gone far off course.

For these reasons, Petitioner Daniel Walz prays that the Court grant *certiorari*.

Respectfully Submitted,

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DANIEL WALZ, by his Guardian Ad Litem DANA P. WALZ, v. EGG HARBOR TOWNSHIP BOARD OF EDUCATION; DR. LEONARD KELPSH, in his OFFICIAL CAPACITY AS SUPERINTENDENT OF EGG HARBOR TOWNSHIP SCHOOLS; Daniel Walz, by his Guardian Ad Litem Dana P. Walz, Appellant

No. 02-1665

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

342 F.3d 271; 2003 U.S. App. LEXIS 18148

January 9, 2003, Argued
August 28, 2003, Filed

JUDGES: Before: SCIRICA, Chief Judge *, BARRY and SMITH, Circuit Judges.

* Judge Scirica began his term as Chief Judge on May 4, 2003.

OPINION OF THE COURT

SCIRICA, *Chief Judge*.

In this appeal, we address whether an elementary school student has a *First Amendment* right to promote an

unsolicited religious message during an organized classroom activity.

I.

Daniel Walz was a student in pre-kindergarten in the spring of 1998. His school, like other elementary schools in Egg Harbor Township, held seasonal, in-class parties several times a year. Organized by teachers and students' parents, the parties generally consisted of a parent-provided snack followed by games and activities. Significant for our purposes, there was usually an exchange of small gifts.

Just prior to Easter, Daniel's class held a seasonal party. The children's parents were encouraged to donate gifts to the local Parent Teacher Organization, which brought the gifts to the holiday party. Explaining why the PTO undertook this role, Dr. Leonard Kelpsh, the Egg Harbor Township school superintendent, said:

> Socially, economically, [our student body is] very diverse, and we just don't like to take the risk that, one, kids would see other kids doing it and feel they have to do it, and they can't afford to do it; and two, you know, sometimes kids don't get everyone in the class something.

According to Dana Walz, Daniel's mother and one of the parents in charge of collecting gifts for the PTO, the PTO generally would mail out requests for "candy, pencils, whatever" from parents. Parents and children generally would respond to those requests with generic donations.

At this particular party, Daniel brought his gifts directly to class where he distributed pencils to his classmates with the imprint, "Jesus [Loves] The Little Children" (heart

symbol). Mrs. Walz had purchased the pencils at a local store because she thought the pencils were "pretty . . . and [Daniel] liked them. . . . We both thought that [the pencils] would be his little gift at Easter, at the Easter party or the spring party."

Daniel's teacher noticed the pencils' imprint and confiscated them. She brought this matter to the attention of the school principal, who contacted Dr. Kelpsh. School superintendent Kelpsh determined the pencils could not be distributed because the young children and their parents might perceive the message as being endorsed by the school.

On October 13, 1998, six months after the party, the Egg Harbor Board of Education adopted a written policy on the recognition of religion in its schools. It provided, in part, that "no religious belief or non-belief shall be promoted in the regular curriculum or in district-sponsored courses, programs or activities, and none shall be disparaged." Religion may be acknowledged in the course of school activities "if presented in an objective manner and as a traditional part of the culture and religious heritage of the particular holiday."

The school also maintained an unwritten policy on student expression. According to Dr. Kelpsh, items with political, commercial, or religious references were not allowed to be distributed in class during school hours. A school's job, said Dr. Kelpsh, was "to develop curriculum," not "endorse" a particular viewpoint. Under the school's policy, according to Dr. Kelpsh, a student would not be allowed to distribute pencils that stated "Home Depot" or "Support the [New Jersey Education Association]."

In December 1998, Daniel's kindergarten class held a seasonal holiday party, where Daniel sought to distribute

candy canes to his classmates. Attached to the candy canes was a religious story, entitled "A Candy Maker's Witness." The story read:

> A Candymaker in Indiana wanted to make a candy that would be a witness, so he made the Christmas Candy cane. He incorporated several symbols for the birth, ministry, and death of Jesus Christ.
>
> He began with a stick of pure white, hard candy. White to symbolize the Virgin Birth and the sinless nature of Jesus, and hard to symbolize the Solid Rock, the foundation of the Church, and firmness of the promises of God.
>
> The candymaker made the candy in the form of a "J" to represent the precious name of Jesus, who came to earth as our Savior. It could also represent the staff of the "Good Shepherd" with which He reaches down into the ditches of the world to lift out the fallen lambs who, like all sheep, have gone astray.
>
> Thinking that the candy was somewhat plain, the candymaker stained it with red stripes. He used three small stripes to show the stripes of the scouring [sic] Jesus received by which we are healed. The large red stripe was for the blood shed by Christ on the cross so that we could have the promise of eternal life.
>
> Unfortunately, the candy became known as a Candy Cane [sic] a meaningless decoration seen at Christmas time. But the meaning is still there for those who "have eyes to see and ears to

> hear." I pray that this symbol will again be used to witness to The Wonder of Jesus and His Great Love that came down at Christmas and remains the ultimate and dominant force in the universe today.

According to Mrs. Walz, she made the decision to attach the story to the candy canes because of its religious significance. She contacted Daniel's school before the holiday party and was informed that Daniel could distribute the candy canes and the attached story to his classmates, but only before school, during recess, or after school, not during the classroom party itself. Daniel planned to give the candy canes to his classmates as they left school for the day, but a rainstorm caused him to distribute them in the hallway outside of the classroom.

A year later, in December 1999, a memorandum from two teacher coordinators was distributed to parent room representatives, including Mrs. Walz, providing guidelines on the "dos and don'ts" for the upcoming holiday party. Parents were requested to provide food and refreshments and prepare activities and games. The memorandum instructed that the party be "as generic as possible." To that end, parent representatives were advised to "choose projects that express the season, such as snowmen versus Santa."

Later that month, Daniel, now a first-grade student, attempted to distribute the candy canes and "Candy Maker's Witness" story during the classroom party, but was prohibited by school officials. The officials permitted him to distribute the candy canes in the hallway outside the classroom, at recess, or after school as students were boarding buses. Mrs. Walz acknowledged the items

distributed at the party by others were, in fact, generic in nature.

Daniel Walz, through his mother, sued the Egg Harbor Township Board of Education and Dr. Kelpsh in his official capacity as school superintendent under *42 U.S.C. § 1983*, alleging violations of the *First Amendment* (freedom of expression and free exercise of religion) and equal protection under the *Fourteenth Amendment*, and under the New Jersey Law Against Discrimination, *N.J. Stat. Ann. § § 10:5-1 to -49*. The complaint alleged a continuing violation based on Daniel's attempts to distribute candy canes and the accompanying story at school holiday parties. In his complaint, Daniel sought a declaration that the school's policy was unconstitutional and an injunction prohibiting defendants from enforcing the policy. Both parties asked for summary judgment. The District Court granted summary judgment in favor of defendants and Daniel Walz filed a timely appeal. n1

n1 We have jurisdiction to review de novo the District Court's grant of summary judgment under *28 U.S.C. § 1291*.

II.

Daniel Walz alleges the school violated his constitutional rights by prohibiting him from distributing the pencils and the candy canes during the classroom holiday parties. At the threshold is an inquiry whether his attempted conduct constituted expressive activity under the *First Amendment*.

The District Court concluded:

> The facts leave little doubt that plaintiff's mother, Dana Walz, is the driving force behind the distribution of these items and this lawsuit. It is highly unlikely that plaintiff, who was only 4 1/2 at the time he attempted to distribute the pencils, was able to independently read and advocate the dissemination of the message on the pencils. Additionally, Mrs. Walz has consistently inquired about and challenged the school's limitations on the distribution of such items and she is the one who is dissatisfied with the accommodations made by the school. The Court will, however, for the purposes of these summary judgment motions, assume that plaintiff, now nine, was attempting to freely speak and exercise his religious beliefs when distributing these items to his young classmates.

Walz by Walz v. Egg Harbor Twp. Bd. of Educ., 187 F. Supp. 2d 232, 234 n.1 (D.N.J. 2002).

Whether Daniel's attempted conduct merits *First Amendment* protection depends on whether it represented Daniel's own expression and whether he suffered an injury of constitutional dimension.

As the District Court noted, Daniel was in pre-kindergarten when he brought the "Jesus [Loves] The Little Children" pencils to the holiday party. Furthermore, Dana Walz appears to have driven her son's activity and this litigation. Although we doubt whether the distribution of the pencils constituted Daniel's own expression, other courts

have recognized that a student of similar age can understand and interpret basic principles of religious expression. *See, e.g., Wallace v. Jaffree, 472 U.S. 38, 42, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985)* (rejecting a state law authorizing a period of silence for voluntary prayer in a matter involving a kindergartner); *DeSpain v. DeKalb County Comm. Sch. Dist., 384 F.2d 836, 837 (7th Cir. 1967)* ("We are of the view that the verse is a prayer and that its compulsory recitation by kindergarten students in a public school comes within the proscription of the *first amendment* . . . ."). In any event, since we find the school's action in preventing the distribution of the pencils was justified, this question is not dispositive here.

III.

A.

In the elementary school setting, age and context are key. n2 Elementary schools are responsible for teaching young children basic social, behavioral, and academic lessons in a structured environment. *See Edwards v. Aguillard, 482 U.S. 578, 584, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987)* ("Families entrust public schools with the education of their children . . . ."); *Bd. of Educ. v. Pico, 457 U.S. 853, 894, 73 L. Ed. 2d 435, 102 S. Ct. 2799 (1982)* (Powell, J., dissenting) ("Unlike the governing bodies of cities and counties, school boards have only one responsibility: the education of the youth of our country during their most formative and impressionable years. Apart from health, no subject is closer to the hearts of parents than their children's education during those years."). Elementary educators design a structured curriculum to facilitate reaching these pedagogical and behavioral goals. *See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272, 98 L. Ed. 2d 592, 108 S. Ct. 562 (1988)*

("[A] school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting.").

> n2 We have examined the elementary school setting previously. In *C.H. v. Oliva, 226 F.3d 198 (3d Cir. 2000)* (en banc), an en banc court equally divided on the *First Amendment* claims of a first-grader, and accordingly affirmed the District Court without further explication. *Id. at 200.* In *Walker-Serrano by Walker v. Leonard*, we found that although plaintiff had not suffered an injury of constitutional dimension, "there can be little doubt that speech appropriate for eighteen-year-old high school students is not necessarily acceptable for seven-year-old grammar school students." *325 F.3d 412, 416-17, 419 (3d Cir. 2003).* Moreover, in *Muller by Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530 (7th Cir. 1996)*, the Court of Appeals for the Seventh Circuit addressed but did not reach agreement on the question of what speech rights elementary school children possess.

While school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969)*, a school's need to control student behavior will necessarily result in limitations on student speech. n3 A quiet reading period

necessarily requires silence, and a "show and tell" exercise may be restricted to age-appropriate items to prevent unsuitable discussions in a kindergarten classroom. *E.g., Walker-Serrano, 325 F.3d at 416* ("Any analysis of the students' rights to expression on the one hand, and of schools' need to control behavior and foster an environment conducive to learning on the other, must necessarily take into account the age and maturity of the student.").

n3 The term speech generally encompasses student expression.

In conventional elementary school activities, the age of the students bears an important inverse relationship to the degree and kind of control a school may exercise: as a general matter, the younger the students, the more control a school may exercise. *See Sch. Dist. v. Schempp, 374 U.S. 203, 290-91 n. 69, 10 L. Ed. 2d 844, 83 S. Ct. 1560 (1963)* (Brennan, J., concurring) ("The susceptibility of school children to prestige suggestion and social influence within the school environment varies inversely with the age, grade level, and consequent degree of sophistication of the child."); *S.G. v. Sayreville Bd. of Educ., 333 F.3d 417, 423 (3d Cir. 2003)* ("[A] school's authority to control student speech in an elementary school setting is undoubtedly greater than in a high school setting."). A school must be able to restrict student expression that contradicts or distracts from a curricular activity. Where student expression interferes with the legitimate teaching of an organized and pedagogically-based classroom activity, a school may reasonably restrict or limit expression beyond the bounds of what the activity intends to teach. *See Sypniewski v. Warren Hills Reg'l Bd. of*

Educ., 307 F.3d 243, 259 (3d Cir. 2002) ("Speech that disrupts education, causes disorder, or inappropriately interferes with other students' rights may be proscribed or regulated."); *see also Hazelwood, 484 U.S. at 280* (Brennan, J., dissenting) ("Free student expression undoubtedly sometimes interferes with the effectiveness of the school's pedagogical functions. Some brands of student expression do so by directly preventing the school from pursuing its pedagogical mission: The young polemic who stands on a soapbox during calculus class to deliver an eloquent political diatribe interferes with the legitimate teaching of calculus.").

As a general matter, the elementary school classroom, especially for kindergartners and first graders, is not a place for student advocacy. To require a school to permit the promotion of a specific message would infringe upon a school's legitimate area of control. *Hazelwood, 484 U.S. at 271* ("Educators are entitled to exercise greater control over [school-sponsored expressive activities] to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school."). Curricular standards, especially those that occur in kindergarten and first grade, when children are most impressionable, should not be lightly overturned. *See Edwards, 482 U.S. at 584* (noting elementary school children "are impressionable").

Furthermore, in an elementary school classroom, the line between school-endorsed speech and merely allowable speech is blurred, not only for the young, impressionable students but also for their parents who trust the school to confine organized activities to legitimate and pedagogically-

based goals. *See Edwards, 482 U.S. at 584* ("Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary."). While "secondary school students are mature enough and are likely to understand that a school does not endorse or support speech that it merely permits on a nondiscriminatory basis," *Bd. of Educ. v. Mergens, 496 U.S. 226, 250, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990)* (plurality), kindergartners and first graders are different. Furthermore, schools may wish to avoid the appearance of endorsing certain student speech. *See Hazelwood, 484 U.S. at 271* (censoring the text of a school newspaper article is permissible to prevent the perception of endorsement).

Determining the appropriate boundaries of student expression is better handled by those charged with educating our youth. School officials who exercise judgment based on their expertise and authority should be afforded leeway in making choices designed to foster an appropriate learning environment and further the educational process. *See id. at 273* ("The education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."); *Walker-Serrano, 325 F.3d at 419* ("The number of everyday decisions that must be made with respect to the boundaries of acceptable behavior of third graders is so great that courts cannot second guess elementary school officials on every minor dispute involving third graders' expression."); *Sypniewski, 307 F.3d at 260* ("Public secondary and elementary school administrators are granted more leeway than public colleges and universities or

legislative bodies."). Accordingly, where an elementary school's purpose in restricting student speech within an organized and structured educational activity is reasonably directed towards preserving its educational goals, we will ordinarily defer to the school's judgment.

B.

In an elementary school setting, the appropriateness of student expression depends on several factors, including the type of speech, the age of the locutor and audience, the school's control over the activity in which the expression occurs, and whether the school solicits individual views from students during the activity. *Cf. Rosenberger v. Univ. of Va., 515 U.S. 819, 834, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995)* (applying strict scrutiny to discrimination based on religious viewpoint where state institution solicits a diversity of views from students); *Planned Parenthood v. Clark County Sch. Dist., 941 F.2d 817, 828-29 (9th Cir. 1991)* (en banc) (editorial control over the speech and specific approval by the school were factors in finding the public would likely perceive the speech to bear the imprimatur of the school).

The appropriateness of student speech must be viewed in its educational context. For a student in "show and tell" to pass around a Christmas ornament or a dreidel, and describe what the item means to him, may well be consistent with the activity's educational goals; likewise, a lesson that includes a mock debate invites individual student expression on the relevant topic. In those scenarios, the student speaker is expressing himself in the context of a school assignment or activity where the school has sought students' personal views. n4

n4 The Supreme Court has made this distinction in the university setting. *Rosenberger, 515 U.S. at 834* ("It does not follow . . . that viewpoint-based restrictions are proper when the University . . . expends funds to encourage a diversity of views from private speakers."). While an elementary school deserves greater discretion to control its curricular activities, individual student expression still may be appropriate depending on the context.

Nevertheless, in the context of an organized curricular activity, an elementary school may properly restrict student speech promoting a specific message. *See C.H., 226 F.3d at 211* (Alito, J., dissenting) ("Public school teachers have the authority to specify the subjects that students may discuss in class and the subjects of assignments that students are asked to complete. Thus, if a student is asked to solve a problem in mathematics or to write an essay on a great American poet, the student clearly does not have a right to speak or write about the Bible instead.") (citations omitted); *cf. Chandler v. James, 180 F.3d 1254, 1265 (11th Cir. 1999)* ("[A] student's right to express his personal religious beliefs does not extend to using the machinery of the state as a vehicle for converting his audience.").

Context is essential in evaluating student speech in the elementary school setting. It would seem reasonable that student expression may implicate religion if done out of personal observance as opposed to outward promotion. n5 There is a marked difference between expression that symbolizes individual religious observance, such as wearing a cross on a necklace, and expression that proselytizes a

particular view. *See Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044, 1053 (9th Cir. 2003)* ("The District cannot refuse to distribute literature advertising a program with underlying religious content where it distributes quite similar literature for secular summer camps, but it can refuse to distribute literature that *itself* contains proselytizing language. The difference is subtle but important.") (emphasis in original). Individual student expression that articulates a particular view but that comes in response to a class assignment or activity would appear to be protected. But, of course, individual student expression that is or is likely to be disruptive may be properly restricted.

n5 The Egg Harbor Board of Education's policy on this subject seems appropriate. It provides that "no religious belief or non-belief shall be promoted in the regular curriculum or in district-sponsored courses, programs or activities, and none shall be disparaged." Under the policy, religion may be acknowledged in the course of school activities "if presented in an objective manner and as a traditional part of the culture and religious heritage of the particular holiday."

C.

Here, plaintiff's counsel stipulated that the pencils and candy cane stories "have a religious message. They were picked in part because they had a religious message, and it was the party's intention to disseminate that religious message." n6 Daniel Walz's promotion of his religion occurred during classroom activities that had a clearly

defined curricular purpose to teach social skills and respect for others in a festive setting. Because of the tender age of the students, the school prohibited the exchange of gifts with commercial, political, religious, or other undertones that promoted a specific message.

n6 Daniel Walz averred two additional claims in his complaint, both of which the District Court properly denied. First, he alleged the school's policy "engaged in hostility toward religion that the *Establishment Clause* itself forbids." But, under the Supreme Court's oft-quoted test in *Lemon v. Kurtzman, 411 U.S. 192, 36 L. Ed. 2d 151, 93 S. Ct. 1463 (1973)*, the school's policy did not advance or inhibit religion and did not create any type of "excessive entanglement" with religion. Instead, the policy was neutral towards religion by prohibiting all endorsements of specific messages, including those with commercial, political, or religious undertones. In not isolating religious messages, the policy does not implicate the *Establishment Clause*. Second, Daniel Walz alleged a violation of the New Jersey Law Against Discrimination, *N.J. Stat. Ann. § § 10:5-1 to -49*. The NJLAD provides that "all persons shall have the opportunity . . . to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation . . . without discrimination because of . . . creed, . . . subject only to conditions and limitations applicable alike to all persons." *Id.* at *§ 10:5-4*. But Daniel has not been denied any accommodation, advantage, facility, or privilege. He was not excluded from the holiday parties, nor was he

prevented from distributing his religious gifts after school or in the hallways. Thus, we will affirm the District Court's denial of the NJLAD claim.

The District Court found "abundant evidence that the school seasonal parties for these young children were meant to have an educational component, and also that they were highly structured, supervised, and regulated." *Walz, 187 F. Supp. 2d at 241*. Several factors combined to demonstrate school control: the teacher's role in planning the holiday parties, the PTO's control over the gift distribution, and the directive of generic gifts. At no point during the holiday parties did the school solicit individual views from the young students about the significance of the holiday to them personally.

Daniel Walz skirted the structure of this organized activity by bringing gifts that promoted a specific religious message. Although he was not the only student to exchange gifts directly with his classmates rather than through the PTO, he was the only student to bring a non-generic gift.

It was well within the school's ambit of authority to prevent the distribution of these items during the holiday parties. The seasonal holiday parties were instructional activities, as much a part of the curriculum as "show and tell" or art class. Students were asked in advance--through a letter to their parents--to donate generic gifts like candy and No. 2 pencils to the PTO. The subsequent exchange of gifts was intended as a teaching tool to promote sharing. The gift-giving from one student to another was not intended to promote a particular religious message.

While this suit alleges a continuing violation--as Daniel continues to attempt to distribute the "Candy Maker's Witness" story during holiday parties--the school has never punished Daniel for his repeated attempts to skirt the holiday parties' rules. And unlike the distribution of the pencils, which the school never permitted, the school has allowed Daniel to give the candy cane stories to his classmates in the school hallway after class or at recess. This accommodation seems more than reasonable and perhaps even unnecessary. *Cf. Walker-Serrano, 325 F.3d at 419* ("Absent punishment for expression, a significant pattern of concrete suppression, or some other form of clear suppression of the expression of elementary school students, a federal *First Amendment* action is not an appropriate forum for resolution of disputes over schools' control of third graders' conduct."). Therefore there was no deprivation of Daniel's *First Amendment* rights with respect to the candy cane stories.

IV.

Nevertheless, the school prohibited Daniel's distribution of the pencils, and he has alleged a constitutional injury. As noted, elementary school students retain certain *First Amendment* rights of expression. *See Wallace, 472 U.S. at 42* (state law authorizing a period of silence for meditation or voluntary prayer is unconstitutional for kindergartners); *W. Va. v. Barnette, 319 U.S. 624, 637, 87 L. Ed. 1628, 63 S. Ct. 1178 (1948)* ("That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."). And where the school solicits individual views

in a classroom assignment, students should be able to respond in a non-disruptive manner.

Plaintiff contends "handing out pencils which stated 'Jesus [Loves] The Little Children' is essentially no different than if Plaintiff had turned to his classmates during snack time and stated, 'Jesus loves the little children. '" We disagree. Where a student speaks to his classmates during snack time, he does so as an individual. But absent disruption, this is fundamentally different from a student who controverts the rules of a structured classroom activity with the intention of promoting an unsolicited message.

In short, Daniel Walz was not attempting to exercise a right to personal religious observance in response to a class assignment or activity. His mother's stated purpose was to promote a religious message through the channel of a benign classroom activity. In the context of its classroom holiday parties, the school's restrictions on this expression were designed to prevent proselytizing speech that, if permitted, would be at cross-purposes with its educational goal and could appear to bear the school's seal of approval. *See Hazelwood, 484 U.S. at 273* ("We hold that educators do not offend the *First Amendment* by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."). n7 Given its valid educational purpose, the school's action here was appropriate. *See id.* ("It is only when the decision to censor . . . student expression has no valid educational purpose that the *First Amendment* is so directly and sharply implicated as to require judicial intervention to protect students' constitutional rights.") (quotation omitted).

n7 Elementary school marks a child's introduction to formal public education and requires a parents to entrust their child's development to another adult mentor. *See Illinois ex rel. McCollum v. Bd. of Educ., 333 U.S. 203, 231, 92 L. Ed. 649, 68 S. Ct. 461 (1948)* (opinion of Frankfurter, J.) (quoted with approval in *Edwards, 482 U.S. at 584*) ("The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny."). During these formative years, elementary school educators must be able to structure an appropriate curriculum to achieve the desired pedagogical and behavioral goals.

For the foregoing reasons, we will affirm the judgment of the District Court.

/s/ Anthony J. Scirica

Chief Judge

DANIEL WALZ, by his Guardian Ad Litem Dana P. Walz, Plaintiff, v. EGG HARBOR TOWNSHIP BOARD OF EDUCATION, et al., Defendants.

CIVIL NO. 00-2149 (JBS)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

187 F. Supp. 2d 232; 2002 U.S. Dist. LEXIS 1984

February 11, 2002, Decided
February 11, 2002, Filed

OPINION:

SIMANDLE, District Judge

This claim for injunctive and declaratory relief arising from the alleged infringement of plaintiff's First and Fourteenth Amendment rights, contrary to *42 U.S.C. § 1983,* comes before the Court on the motion for summary judgment by plaintiff Daniel Walz ("Daniel") and the cross-motion for summary judgment by defendants the Egg Harbor Township Board of Education ("Egg Harbor BOE") and Leonard Kelpsh ("Dr. Kelpsh") in his official capacity as Superintendent of Egg Harbor Township Schools (or, collectively, "defendants"), pursuant to Rule 56, Fed. R. Civ. P. Plaintiff seeks summary judgment on his Complaint, a declaration that defendants' policy of prohibiting the distribution of religious gifts in the classroom is unconstitutional, and an injunction prohibiting defendants from enforcing this policy. Defendants argue that the

restrictions placed on Daniel were viewpoint neutral and reasonably related to the school's pedagogical purpose. Defendants further note that reasonable accommodations were made for the distribution of plaintiff's religious material. For the following reasons, defendants' motion for summary judgment will be granted, and plaintiff Daniel Walz's Complaint will be dismissed.

I. BACKGROUND

The facts of this case involving proselytizing pencils, evangelical candy canes, and very young school children are largely undisputed. Plaintiff Daniel Walz, now nine years of age, was born on September 25, 1992 and has attended public school in Egg Harbor Township since 1998. On three occasions, discussed in detail below, plaintiff was not allowed to distribute items with a religious message in class or during school-sponsored and supervised holiday parties. These three incidents are the basis of plaintiff's Complaint, which alleges violations of plaintiff's First Amendment free speech and free exercise rights, Fourteenth Amendment equal protection rights, *42 U.S.C. § 1983,* and the New Jersey Law Against Discrimination ("NJLAD").

The first alleged incident occurred in the spring of 1998, when plaintiff was in developmental kindergarten ("pre-K") and attended an in-class, school-sponsored holiday party. During the party, the then four and one-half year-old plaintiff Daniel distributed pencils with the imprinted message "Jesus [heart symbol] the Little Children" to the other children in his pre-K class. (See Laffey Cert., Ex. C, Picture of the "proselytizing pencils.") Plaintiff's mother, Dana Walz, who was present at the party as a chaperone, selected and purchased the pencils for plaintiff to distribute at school

because of their religious message. n1 Plaintiff's then teacher, Joan Safaryn, collected the pencils and contacted several school officials, including the school's superintendent, defendant Dr. Kelpsh, in order to determine whether the pencils should be distributed at the in-class party. Dr. Kelpsh determined that the pencils should not be distributed at the in-class, school-sponsored holiday party because the young children and their parents might be confused as to the school's endorsement of the religious message. After this incident, Mrs. Walz inquired as to whether the school had a written policy regarding freedom of religious expression in school and was informed that there was no such policy. Mrs. Walz provided the school with some information that she believed would aid in the implementation of such a policy.

n1 The facts leave little doubt that plaintiff's mother, Dana Walz, is the driving force behind the distribution of these items and this lawsuit. It is highly unlikely that plaintiff, who was only 4 1/2 at the time he attempted to distribute the pencils, was able to independently read and advocate the dissemination of the message on the pencils. Additionally, Mrs. Walz has consistently inquired about and challenged the school's limitations on the distribution of such items and she is the one who is dissatisfied with the accommodations made by the school. The Court will, however, for the purposes of these summary judgment motions, assume that plaintiff, now nine, was attempting to freely speak and exercise his religious beliefs when distributing these items to his young classmates.

On October 13, 1998, the Egg Harbor BOE adopted a written policy regarding the recognition of religion in its schools. That policy, in part, provides that "no religious belief or non-belief shall be promoted in the regular curriculum or in district-sponsored courses, programs or activities, and none shall be disparaged." (Laffey Cert., Ex. D.) The policy, however, recognizes that a broad secular education can be furthered by exposing pupils to various cultural and religious societies, and provides that religion may be acknowledged in the course of teaching and school activities "if presented in an objective manner and as a traditional part of the culture and religious heritage of the particular holiday." Id. Mrs. Walz believed that the adopted policy, which does not specifically address the dissemination of religious materials, would allow her son, the plaintiff, to hand out gifts with religious messages in school. (See Walz Cert., P 7.)

The second alleged incident occurred in December, 1998, when plaintiff was in kindergarten and attended an in-class, school-sponsored winter holiday party. During the winter party, the then five year-old plaintiff distributed candy canes with an attached religious story, entitled "A Candy Maker's Witness." n2 Mrs. Walz first read the evangelical story when her daughter brought home a copy from a local event. Mrs. Walz entered the story on her home computer and made duplicate copies, which she then attached to the candy canes plaintiff attempted to distribute at the winter party. Mrs. Walz chose to attach the story because it was symbolic of the Christian holiday and because of the religious significance it projected onto the candy canes. When Mrs. Walz contacted the school regarding plaintiff's ability to distribute the candy canes, she was told that plaintiff would not be permitted to

distribute the canes and evangelical message in class, but that he would be permitted to distribute the items before school, during recess, or after school. Plaintiff was also permitted to distribute the candy canes in the hallway after school.

n2 The story attached to the candy plaintiff attempted to distribute is as follows:

> A candymaker in Indiana wanted to make a candy that would be a witness, so he made the Christmas candy cane. He incorporated several symbols for the birth, ministry, and death of Jesus Christ.
>
> He began with a stick of pure white, hard candy. White to symbolize the Virgin Birth and the sinless nature of Jesus, and hard to symbolize the Solid Rock, the foundation of the Church, and the firmness of the promises of God.
>
> The candymaker made the candy in the form of a "J" to represent the precious name of Jesus, who came to earth as our Savior. It could also represent the staff of the "Good Shepherd" with which He reaches down into the ditches of the world to lift out the fallen lambs who, like all sheep, have gone astray.
>
> Thinking that the candy cane was somewhat plain, the candymaker stained it with red stripes. He used three small stripes to show the stripes of the scouring Jesus received by which we are healed.

> The large red stripe was for the blood shed by Christ on the cross so that we could have the promise of eternal life.
>
> Unfortunately, the candy became known as a candy cane, a meaningless decoration seen at Christmas time. But the meaning is still there for those who "have eyes to see and ears to hear." I pray that this symbol will again be used to witness The Wonder of Jesus and His Great Love that came down at Christmas and remains the ultimate and dominant force in the universe today.

(See Laffey Cert., Ex. E.)

This is one of several purported origins for the candy cane. Although the truth of the message a plaintiff seeks to disseminate is not determinative of the issue at hand, it is interesting to consider some of the other purported origins of the candy cane. Some brief research revealed that candy canes were first seen in or around 1670 in Cologne, Germany, approximately 130 years before Indiana was organized as a territory and 146 years before it became a state in 1816. The canes were white and used to reward children who were well behaved while in church. Most depictions of such canes on Christmas cards prior to 1900 reveal that the red stripes were not added until the twentieth century. The canes have primarily been associated with the Christmas holiday in one form or another, but their actual religious symbolism, if any, is unclear.

The third alleged incident occurred in December, 1999, when plaintiff was in first grade and attended an in-class, school-sponsored winter holiday party. n3 After his mother contacted the school and was again informed that the then six year-old plaintiff would only be permitted to distribute the proselytizing candy canes before school, during recess, or after school, and not during the in-class, school-sponsored event, plaintiff distributed the canes in the school hallway after class. Mrs. Walz acknowledged that the other items distributed at the December, 1999 party were generic in nature. (Walz Dep., Tr. 75.) Mrs. Walz also concedes that plaintiff is still allowed to distribute items with religious significance outside of school hours and outside the classroom. (Id. at 113.)

n3 Prior to this party, a memorandum from two teacher coordinators was distributed which gave guidelines about the "dos and don'ts" for the Winter Holiday Party. The memo instructed that the parties should be as generic as possible, emphasizing the whole season. (Defs.' Ex. C.)

The defendants' general policy regarding gift-giving of any kind at plaintiff's school is that any gifts should be donated to the local Parent Teacher Organization ("PTO"), which would then distribute the trinkets to the class at the seasonal event. Direct gifts from students are discouraged because of the potential economic strain on certain students and the potential emotional distress if a particular student were to be excluded from the direct gift-giving. (Pl.'s Ex. F.,

Kelpsh Dep., Tr. 59:14-22.) This policy is not written, but rather orally communicated from the principal to teachers, who disseminate the information to other teachers, parents, and students through holiday letters and memoranda. (Kelpsh Dep., Tr. 59:7-60:24.) Items with corporate names or references to political candidates or unions are not allowed to be distributed in any class during school hours. (Def.'s Ex. D, Kelpsh Dep., Tr. 62:5-64:24.) Plaintiff's teacher, who confiscated the proselytizing pencils in 1998, said she would have done the same thing if the pencils had contained a political or commercial message, such as "Vote for Joe Smith" or "Home Depot." (Def.'s Ex. E, Safaryn Dep., Tr. 16:2-19:19.) Mrs. Walz asserted that she witnessed other children directly handing out gifts, some wrapped, at holiday parties, which contained generic pencils and candy. (See Walz Cert., P 12; Def.'s Ex. A, D. Walz Dep., Tr. 74:9-75:21.) Mrs. Walz claimed that her son's religious gifts were the only ones not permitted to be directly distributed from a student to the class, but offered no specific instances where other children were allowed to directly distribute gifts and no evidence of such conduct. (See Walz Cert., P 12.) Mrs. Walz identified no instance in which another child distributed a non-generic gift with any sort of message during class time.

Dr. Kelpsh elaborated on the intent behind the limited gift distribution policy by stating that it was to ensure that no confusion about the origin of any distributed gifts with corporate, political, or religious messages, and also that the BOE did not want anyone to mistakenly believe that the school was endorsing any particular message. (Kelpsh Dep., Tr. 74-77; Walz Dep., Tr. 60:5-17.) School classes and events under the authority of the Egg Harbor BOE are closely controlled and monitored by the principal and teachers. Additionally, teachers and occasionally parents,

including at times Mrs. Walz, were present at each of the school-sponsored parties at issue. There is no allegation that the defendants treated one religion more favorably than plaintiff's Christianity; rather, plaintiff asserts that other generic gifts without messages were allowed, when plaintiff's proselytizing pencils and evangelical candy canes were not.

On May 2, 2000, plaintiff, through his mother and Guardian Ad Litem Dana P. Walz, filed a Complaint in this Court, alleging that the defendants violated his First Amendment free exercise and freedom of expression rights (see Compl., PP IV-V), his Equal Protection rights under the Fourteenth Amendment (see Compl., PP VI-VII), and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et. seq. ("NJLAD")(see Compl., P VIII). On July 6, 2001, both plaintiff and defendants cross-moved for summary judgment. For the reasons stated herein, the Court finds that no material facts are in dispute and that the defendants are entitled to judgment as a matter of law that they have not violated plaintiff's rights. Defendants' motion will be granted and plaintiff's motion and complaint will be dismissed.

II. DISCUSSION

Defendants and plaintiff Daniel cross-move for summary judgment in this action under Rule 56, Fed. R. Civ. P. Plaintiff argues that defendants violated *42 U.S.C. § 1983* when they allegedly curtailed plaintiff's freedom of speech and free exercise First Amendment rights and violated the Equal Protection clause of the Fourteenth Amendment, and also that defendants' conduct violated the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq. ("NJLAD"). Plaintiff seeks a declaration that the school's policy is unconstitutional and an injunction prohibiting the future

enforcement of the policy. Defendants argue that the pre-K, kindergarten, and first grade classrooms are non-public forums and that the limitations placed on plaintiff's in-class activities were reasonable and viewpoint neutral and therefore permissible.

1. Summary Judgment Standard

Summary judgment is appropriate when the materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." See *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).* A fact is "material" only if it might affect the outcome of the suit under the applicable rule of law Id. Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment. Id.

In deciding whether there is a disputed issue of material fact, the court must view the evidence in favor of the non-moving party by extending any reasonable favorable inference to that party; in other words, "The nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor.'" *Hunt v. Cromartie, 526 U.S. 541, 552, 143 L. Ed. 2d 731, 119 S. Ct. 1545 (1999)*(quoting *Anderson, 477 U.S. at 255).* The threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Liberty Lobby, 477 U.S. at 250; Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 329-330 (3d Cir. 1995)* (citing *Anderson, 477 U.S. at 248)* ("The nonmoving party creates a genuine issue of material fact if it provides

sufficient evidence to allow a reasonable jury to find for him at trial.").

The moving party always bears the initial burden of showing that no genuine issue of material fact exists, regardless of which party ultimately would have the burden of persuasion at trial. See *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Jalil v. Avdel Corp., 873 F.2d 701, 706 (3d Cir. 1989),* cert. denied, *493 U.S. 1023, 107 L. Ed. 2d 745, 110 S. Ct. 725 (1990).* However, where the nonmoving party bears the burden of persuasion at trial, "the burden on the moving party may be discharged by 'showing' -- that is, pointing out to the district court --that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp., 477 U.S. at 325.*

The standard by which the court decides a summary judgment motion does not change when the parties file cross-motions. *Weissman v. United States Postal Serv., 19 F. Supp. 2d 254 (D.N.J. 1998).* When ruling on cross-motions for summary judgment, the court must consider the motions independently, *Williams v. Philadelphia Hous. Auth., 834 F. Supp. 794, 797 (E.D. Pa. 1993),* aff'd, *27 F.3d 560 (3d Cir. 1994),* and view the evidence on each motion in the light most favorable to the party opposing the motion. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).*

2. Plaintiff's Section 1983 Claims Related to First and Fourteenth Amendment Violations

There is no dispute that defendants are state actors who acted under color of state law. There is no dispute that the pre-kindergarten, kindergarten, and first grade public school classrooms where the alleged constitutional violations

transpired are non-public forums, in which school officials can reasonably restrict the speech of students and teachers. n4 (See Pl.'s Mot. for Summ. J. at 5; Defs.' Cross-Mot. for Summ. J. at 14.) There is also no dispute that defendants allowed plaintiff to distribute his pencils and candy canes before school, during lunch or recess, and after school, and restricted the distribution of the pencils and candy canes in the classroom and during class-time only. (Walz Cert., PP 9-11.) Despite plaintiff's mother's dissatisfaction n5 with the accommodations made for the distribution of plaintiff's religious gifts, well-established precedent demonstrates that there has been no violation of plaintiff Daniel Walz's constitutional rights and his motion for summary judgment will be denied, and defendants' motion for summary judgment will be granted, and plaintiff's Complaint will be dismissed, for the following reasons.

n4 This concession obviates the need for an extended discussion of the non-applicability of cases like *Good News Club v. Milford Cent. Sch., 533 U.S. 98, 121 S. Ct. 2093, 150 L. Ed. 2d 151 (2001),* which concerned a limited public forum and religious group access to school property that had previously been opened to the public for use. Plaintiff acknowledges the factual differences between this case and Good News Club, but urges that it be applied when evaluating the defendants' restriction of plaintiff's speech. As discussed below, the restriction imposed by the school was viewpoint neutral and reasonably related to pedagogical concerns, and therefore permissible.

n5 Defendants raise the issue that it is actually plaintiff's mother, Mrs. Walz, who is attempting to exercise her First Amendment rights in a public school classroom through her son. It was Mrs. Walz, not Daniel, who selected and purchased the pencils and who discovered and attached the Witness story to the candy canes. It was Daniel, however, who ultimately distributed the items to his classmates, although Mrs. Walz was present during the three instances at issue. While it is questionable that a 4 1/2 year old child has the capacity to understand and assert his constitutional rights by handing out "Jesus [heart symbol] the Little Children" pencils and Candy Maker's Witness candy canes, the Court will assume for the purposes of this motion that the distribution of these items was an assertion of Daniel's speech.

The First Amendment provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. Const. amend. I. This freedom of speech, however, is not unlimited in non-public forums. n6 "Speech uttered in a non-public forum may be subject to time place and manner regulations, and these regulations must be viewpoint-neutral and reasonably related to a legitimate governmental purpose." *C.H. v. Oliva, 990 F. Supp. 341, 352 (D.N.J. 1997),* aff'd in relevant part, vacated and remanded in part on other grounds, *226 F.3d 198 (3d Cir. 2000)*(en banc), cert. denied, *Hood v. Medford Twp. Bd. of Educ., 533 U.S. 915, 121 S. Ct. 2519, 150 L. Ed. 2d 692 (2001).* The First Amendment rights of children in a

public school "are not automatically coextensive with the rights of adults in other settings," and must be "applied in light of the special characteristics of the school environment." *Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266, 108 S. Ct. 562, 567, 98 L. Ed. 2d 592 (1988); C.H., 990 F. Supp. at 352, n.17.* "Educators may 'exercise editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.'" *C.H., 990 F. Supp. at 353* (quoting *Hazelwood, 484 U.S. 260, 273, 108 S. Ct. 562, 571, 98 L. Ed. 2d 592 (1988)).*

n6 As noted above, plaintiff does not dispute that his grade school classrooms are non-public forums.

Plaintiff claims that the restrictions placed on his distribution of proselytizing pencils and evangelical candy canes are not viewpoint neutral because other children were allowed to "express themselves" by directly distributing generic gifts at the in-class seasonal parties. Plaintiff's mother, and presumably plaintiff, were dissatisfied with the school's accommodation which allowed plaintiff to distribute his religious gifts outside of the classroom and after school hours. The Court finds that this minor restriction is viewpoint neutral and extremely reasonable.

Plaintiff argues that "since the restriction addressed religious speech specifically it is automatically not viewpoint neutral." (Pl.'s Br. at 5.) Viewpoint neutral, however, does not mean that any regulation that relates to the viewpoint of the speech is prohibited, but rather that the regulation must

be based solely upon larger pedagogical concerns rather than a particular point of view. See *C.H., 990 F. Supp. at 353* (citing *Duran v. Nitsche, 780 F. Supp. 1048, 1052 (E.D. Pa. 1991)*(quoting *Hazelwood, 484 U.S. at 273)).*

Plaintiff cites the United States Supreme Court's decision in Lamb's Chapel v. Center Moriches Union Free School District in support of his position that defendants' actions in this case were not viewpoint neutral and therefore constituted viewpoint discrimination. *508 U.S. 384, 394-95, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993).* In Lamb's Chapel, the Court struck down a school policy that permitted school facilities to be used by a variety of groups during after-school hours, but excluded a group who planned to show a film containing the Christian perspective about child-rearing techniques. See *508 U.S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352.* The Court found that the exclusion of the otherwise permissible film solely because it dealt with the subject [child-rearing] from a religious standpoint was viewpoint discrimination. *Lamb's Chapel, 508 U.S. at 394-95, 113 S. Ct. at 2147-48;* accord, *C.H., 226 F.3d at 210-11* (en banc)(Alito, J., dissenting)(internal citations and quotations omitted).

The restrictions placed upon plaintiff's dissemination of his religious messages in this case is not "viewpoint discrimination" because the School District did not open a forum for the exchange of views about a subject, in which case the District could not proscribe a "religious viewpoint" unless it passed a strict scrutiny test. See *Lamb's Chapel, 508 U.S. at 394-95, 113 S. Ct. 2141.* Here, the contribution of generic gifts bearing no messages was permitted to all students, and this was not a forum to promote any point of view, religious or secular. The seasonal parties for pre-K, kindergarten, and first grade students were school events

intended to promote sharing and caring among students, to develop social skills, and to learn about talking in turn when in a large group. Students were not told to bring gifts with their favorite seasonal message; rather, students and their parents were instructed that all gifts should be generic and donated to the PTO for distribution at the seasonal parties. Therefore, this case does not involve viewpoint discrimination in the way present in Lamb's Chapel or as found by Judge Alito in C.H. Furthermore, these parties were limited to the grade school students, their teachers, and a few parent-chaperones and were not designed to promote any point of view, religious, commercial, or secular.

Plaintiff has come forward with no proof that other children were allowed to disseminate messages in class or at in-class, school-sponsored parties. Plaintiff concedes that no religion was treated differently or more favorably than plaintiff's Christianity. Plaintiff also concedes that the other gifts he claims that were given by children at the holiday parties were generic in nature, containing no speech whatsoever. n7 Dr. Kelpsh and plaintiff's teacher, Ms. Safaryn, testified in their depositions that children are not allowed to distribute any items that contain promotional, commercial, political or other speech. (See Kelpsh Dep., Tr. 62:5-64:24; Safaryn Dep., Tr. 16:2-19:19.) Additionally, the school took affirmative steps to regulate the items distributed at school parties by having the PTO, rather than individual students, collect and distribute the candies and gifts. No facts are presented by plaintiff to contradict this evidence. The school's regulation of plaintiff's speech was viewpoint neutral.

n7 Although defendants dispute that any child was allowed to directly to distribute gifts at holiday parties, there is no allegation that any of the gifts contained any message or speech.

The Court further finds that the restriction was reasonably related to the school's pedagogical concerns, and also that plaintiff was offered a reasonable accommodation for the distribution of his gifts. There is no dispute that Daniel was able to distribute each religious gift and message to his classmates on school property outside the classroom setting. Plaintiff argues that this case is similar to the seminal case Tinker v. Des Moines Indep. Cmty Sch. Dist., in which the Supreme Court deemed black arm bands worn by high school students in protest of the Vietnam war to be pure speech entitled to full First Amendment protections. *393 U.S. 503, 511, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).* Pre-kindergarten, kindergarten, and first grade students celebrating at an in-class party, however, are different than high school students independently expressing political beliefs. The age and grade level of the child seeking to exercise his or her speech in school is relevant and should be considered by courts determining whether the restrictions placed on speech were appropriate. See *Edwards v. Aguillard, 482 U.S. 578, 584, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987)*(noting that elementary school children "are impressionable and their [attendance] at school is involuntary."); *C.H., 226 F.3d at 203* (affirming district court's judgment that the relocation of plaintiff's Jesus poster and the restriction on plaintiff's religious story reading to his first grade classmates were reasonably related to legitimate pedagogical concerns); *DeNooyer v. Livonia Pub. Sch., 799*

F. Supp. 744 (E.D. Mich. 1992), aff'd, *12 F.3d 211 (6th Cir. 1993),* cert. denied, *511 U.S. 1031, 128 L. Ed. 2d 193, 114 S. Ct. 1540 (1994)*(concluding that school's restriction of plaintiff's showing of a video to her second grade class in which she sang a religious song to be reasonable and a legitimate pedagogical concern). The Seventh Circuit expressed the justification for this greater restriction of school speech when elementary school students are involved:

> The potential 'verbal cacophony' of a public forum can be antithetical to the delicate 'custodial and tutelary' environment of an elementary school. . . . Declaring the elementary school classroom, hallway, or playground forums for unfettered student communication would require either a severe incursion into the critical educational mission of the elementary school or a substantial contraction of the First Amendment protections afforded speech in a public forum. Perhaps both. . . . In a public forum, the Christian can tell the Jew he is going to hell, or the Jew can tell the Christian that he is not one of God's chosen, no matter how that may hurt. But it makes no sense to say that the overly zealous Christian or Jewish child in an elementary school can say the same thing to his classmate, no matter the impact.

Muller by Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1539-40 (7th Cir. 1996), cert. denied, *520 U.S. 1156, 137 L. Ed. 2d 495, 117 S. Ct. 1335 (1997)* (citations omitted).

Plaintiff does not address these issues and instead attempts to distinguish the relevant cases of Hazelwood and

C.H. by arguing that they were limited to speech mandated by the school's curriculum. Plaintiff argues that the school-supervised, in-class parties at which candies and treats were distributed by the PTO were purely "social activities" where "no pedagogical concerns exist." (Pl.'s Br. at 8.) The Court disagrees. There is abundant evidence that the school seasonal parties for these young children were meant to have an educational component, and also that they were highly structured, supervised, and regulated. Non-parent outsiders were not allowed to attend the party and the parties took place during school hours. Children were taught important social skills at the parties and were not permitted to freely move around or talk at will. (See Safaryn Dep., Tr. 14:1-15:25.) Also, it is intuitive that school activities, whether they are social or academic in focus, for four, five, and six year-old children have a high degree of structure, so that the young children are not confused or overwhelmed by concepts and other stimuli they cannot understand. Thus, the defendants' restriction of plaintiff's gift-giving during the holiday parties was reasonably related to the important pedagogical concerns of the school. n8 Nothing has been presented in opposition from which a reasonable inference could be drawn to suggest that these pedagogical concerns were pretextual.

n8 Additionally, plaintiff was and is still allowed to distribute his gifts after school. This is an extremely reasonable accommodation.

3. Establishment Clause

Plaintiff additionally asserts in his brief in support of summary judgment that defendants "have engaged in hostility toward religion that the Establishment Clause itself forbids." (Pl.'s Br. at 11.) This claim was not made in plaintiff's Complaint, but since defendants raised the issue as a defense, and both parties briefed the issue, and because leave to amend pleadings should be freely given, see Rule 15(a), Fed. R. Civ. P., the Court will deem the Complaint amended to assert plaintiff's Establishment Clause claim and will consider whether defendants' policy violated the Establishment Clause.

The First Amendment's Establishment Clause prohibits governmental advancement or restriction of religion. U.S. Const. amend. I. The Supreme Court has written that "[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion, . . . favoring neither one religion over others nor religious adherents collectively over nonadherents." *C.H., 990 F. Supp. at 354* (quoting *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 696, 114 S. Ct. 2481, 2487, 129 L. Ed. 2d 546 (1994)).*

Although not referenced by plaintiff, the inquiry for determining whether an Establishment Clause violation has occurred was set forth by the United States Supreme Court in *Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971).* The Lemon inquiry, which may or may not still be properly classified as a three-prong test to determine whether a violation of the Establishment Clause has occurred, n9 guides courts to consider whether the challenged practice (1) has a secular purpose; (2) has a principal or primary effect which neither advances nor inhibits religion; and (3) does not create an excessive

entanglement of the government with religion. *Lemon, 403 U.S. at 612-13, 91 S. Ct. at 2111; Lamb's Chapel, 508 U.S. at 395, 113 S. Ct. at 2148; Board of Educ. of Kiryas Joel Village Sch. Dist, 512 U.S. at 696-97, 114 S. Ct. at 2488* (citing Lemon with approval); *ACLU v. Black Horse Pike Regional Bd. of Educ., 84 F.3d 1471, 1483 (3d Cir. 1996); ACLU v. Schundler, 168 F.3d 92, 97 (3d Cir. 1999)*(citing Lemon with approval); *C.H., 990 F. Supp. at 354;* see also *C.H., 226 F.3d at 212-13* (Alito, J., dissenting)(finding that "the Establishment Clause is not violated when the government treats religious speech and other speech equally and a reasonable observer would not view the government practice as endorsing religion").

n9 This Court recognizes that the three-prong Lemon test has been criticized on a number of levels, and by several Supreme Court Justices, but that it has not been overruled and the spirit of the inquiry is as applicable to determining whether an Establishment Clause has occurred as any other suggested by its critics. See *Lamb's Chapel, 508 U.S. at 397, 113 S. Ct. at 2149 (Kennedy, J., concurring in part and concurring in the judgment), 508 U.S. at 397-98, 113 S. Ct. at 2149* (Scalia, J., concurring in the judgment); see also *Tangipahoa Parish Bd. of Educ. v. Freiler, 530 U.S. 1251, 120 S. Ct. 2706, 147 L. Ed. 2d 974 (2000)*(mem.), denying cert. *185 F.3d 337 (5th Cir. 1999)*(Scalia, J., dissenting)(detailing criticism of, but not overruling the validity of, the Lemon inquiry).

Defendants restricted the time and place where plaintiff could distribute his gifts, and that restriction was not in any way hostile to plaintiff's Christianity. The students were prohibited, under the defendants' policy, from contributing gifts bearing any message, whether political, commercial, or religious, such that religious messages were not singled out but were grouped with similar forms of speech. Perhaps the Establishment Clause would be implicated if the policy permitted distribution of all gifts containing any messages except religious messages, since the policy might show disapproval of religion, per se. See *Edwards v. Aguillard, 482 U.S. 578, 585, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987)*(emphasizing importance of discerning whether the challenged policy is designed to "endorse or disapprove of religion").

Although it is true that plaintiff was prevented from distributing his gifts in class because of their message, which was of a religious nature, and because he sought to give them individually rather than contribute them to the collective PTO effort, the defendants' actions in this case did not advance or inhibit religion as such, and did not create any type of excessive entanglement with religion. Defendants' restriction upon all political, commercial and religious endorsements, particularly when the age of the schoolchildren is considered, could not be found by a fair-minded factfinder to be anything but reasonable. n10 Additionally, plaintiff was allowed to distribute his gifts on school premises outside of class time. There was simply no excessive entanglement with plaintiff's religion posed by defendants' simple, common-sense accommodation which permitted him to distribute his gifts to classmates of his choice outside the class while on school premises.

Defendants, therefore, did not violate the Establishment Clause.

n10 Further, if the defendants had made an exception to the policy, to permit plaintiff's religious message while precluding other messages, the possibility is real that a reasonable observer would perceive the defendants as endorsing this religious message. See *County of Allegheny v. ACLU, 492 U.S. 573, 605, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989)*(in which majority of Justices endorsed the principle that the Establishment Clause "certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions)").

4. Plaintiff's NJLAD Claims

Plaintiff additionally claims in his Complaint that defendants "withheld from Plaintiff accommodations, advantages, facilities, and privileged available to other students" and therefore violated the New Jersey Law Against Discrimination. (Pl.'s Br. at 14.) Plaintiff alleges that "other students were allowed to give out gifts in class" while plaintiff was not allowed to distribute his religious messages, but points to no specific instances where other children were allowed to give direct gifts and concedes that any such gifts that might have been distributed were generic.

The applicable section of the NJLAD provides that "all persons shall have the opportunity . . . to obtain all the accommodations, advantages, facilities, and privileges of any

place of public accommodation . . . without discrimination because of . . . creed, subject only to conditions and limitations applicable alike to all persons. N.J.S.A. 10:5-4. Plaintiff has not been denied any accommodation, advantage, facility, or privilege of his public school n11 based on his Christian faith. There is no legal precept under the NJLAD which mandates that a child be able to distribute religious messages in his public grade school class. Plaintiff has not cited one case finding a violation of the NJLAD arising from facts similar to those present in this case. Plaintiff also has not alleged that other children were allowed to distribute gifts with religious messages from non-Christian faiths. Additionally, plaintiff was not excluded from the holiday parties, nor was he prevented from distributing his religious gifts after school. Plaintiff's claim under the NJLAD thus fails.

n11 Public schools, such as the one attended by plaintiff, are places of public accommodation under the NJLAD. See *Hinfey v. Matawan Reg'l Bd. of Educ., 77 N.J. 514, 523, 391 A.2d 899 (1978).*

III. CONCLUSION

For the foregoing reasons, the Court will grant defendants' motion for summary judgment and will dismiss plaintiff's complaint with prejudice. The accompanying Order will be entered.

February 11, 2002
Dated

JEROME B. SIMANDLE

U.S. District Judge

ORDER

Filed: February 11, 2002

THIS MATTER having come before the court on plaintiff's motion for summary judgment, and defendants' cross-motion for summary judgment pursuant to Rule 56, Fed. R. Civ. P.; and the Court having considered the submissions of the parties; and for the reasons stated in the accompanying Opinion;

IT IS on this day of February 2002, hereby

ORDERED that defendants' cross-motion for summary judgment [Docket Item 13-1] be, and hereby is, **GRANTED**, and plaintiff's motion for summary judgment [Docket Item 12-1] be, and hereby is **DISMISSED**; and

IT IS FURTHER ORDERED that plaintiff's Complaint is hereby **DISMISSED WITH PREJUDICE**.

JEROME B. SIMANDLE

U.S. District Judge

C1

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DANIEL WALZ, by his Guardian Ad Litem Dana P. Walz,

Plaintiff,

v.

EGG HARBOR TOWNSHIP BOARD OF EDUCATION, et al.,

Defendants.

HONORABLE JEROME B. SIMANDLE

CIVIL NO. 00-2149 (JBS)

ORDER

THIS MATTER having come before the court on plaintiff's motion for summary judgment, and defendants' cross-motion for summary judgment pursuant to Rule 56, Fed. R. Civ. P.; and the Court having considered the submissions of the parties; and for the reasons stated in the accompanying Opinion;

IT IS on this 8th day of February 2002, hereby

ORDERED that defendants' cross-motion for summary judgment [Docket Item 13-1] be, and hereby is, **GRANTED**, and plaintiff's motion for summary judgment [Docket Item 12-1] be, and hereby is **DISMISSED**, and

IT IS FURTHER ORDERED that plaintiff's Complaint is hereby **DISMISSED WITH PREJUDICE**.

/s/

JEROME B. SIMANDLE
U. S. District Judge

D1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1665

DANIEL WALZ,
by his Guardian Ad Litem DANA P. WALZ

v.

EGG HARBOR TOWNSHIP BOARD OF EDUCATION;
DR. LEONARD KELPSH, in his OFFICIAL CAPACITY AS SUPERINTENDENT OF EGG HARBOR TOWNSHIP SCHOOLS

Daniel Walz, by his Guardian
Ad Litem Dana P. Walz,
Appellant

(D.C. Civ. No. 00-cv-02149)

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*,
SLOVITER, NYGAARD, ALITO, ROTH, McKEE,
RENDELL, BARRY, AMBRO, FUENTES, SMITH

and CHERTOFF, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/

Chief Judge

Dated: 09/30/03
CMH/cc: MPL, KJH, AVR

E1

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1665

DANIEL WALZ,
by his Guardian Ad Litem DANA P. WALZ

v.

EGG HARBOR TOWNSHIP BOARD OF EDUCATION;
DR. LEONARD KELPSH, in his OFFICIAL CAPACITY AS SUPERINTENDENT OF EGG HARBOR TOWNSHIP SCHOOLS

Daniel Walz, by his Guardian
Ad Litem Dana P. Walz,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
D. C. Civil Action No. 00-cv-02149
(Honorable Jerome B. Simandle)

E2

Argued January 9, 2003
Before: SCIRICA, *Chief Judge*[1], BARRY and SMITH,
Circuit Judges

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on January 9, 2003. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered February 11, 2002, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/

Clerk

---

1 Judge Scirica began his term as Chief Judge on May 4, 2003.

E3

DATED: Aug. 28, 2003

Supreme Court, U.S.
FILED
FEB 18 2004
OFFICE OF THE CLERK

No. 03-982

IN THE

Supreme Court of the United States

DANA P. WALZ, Guardian ad litem, on behalf of Daniel Walz,

Petitioner,

v.

EGG HARBOR TOWNSHIP BOARD OF EDUCATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether a student attending pre-kindergarten, kindergarten and first grade, respectively, has a First Amendment right to distribute items bearing overtly religious messages to a captive audience of four, five and six year old children during annual in-class school sponsored seasonal events intended to achieve certain learning objectives.

II. Whether providing alternate times and/or locations on school premises for distribution of items bearing overtly religious messages constitutes a violation of Petitioner's First Amendment rights.

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STATEMENT OF THE CASE

Petitioner, Daniel Walz, bases his complaint upon three events each of which occurred during an in-class school sponsored seasonal party. Each event took place during regular school hours. All students were required to attend and non-parent outsiders were not allowed to attend the events. App. B19. All events were closely controlled and monitored by the principal and teachers. App. B8. Further, as detailed below, Respondent provided numerous legitimate pedagogical reasons underlying its policies, as well as, application of those policies in this case. Moreover, Petitioner was permitted to distribute his proselytizing items on school premises outside of the context of the in-class school sponsored activities.

In the Spring of 1998, Petitioner's mother, Mrs. Dana Walz, purchased pencils inscribed with a religious message: "Jesus (heart symbol) the Little Children." She selected the pencils for Petitioner to distribute at an in-class event because of the message and the intended audience, children. App. B2. Petitioner attempted to distribute the pencils at the school's in-class spring party. Petitioner, who was approximately 4 years old at the time, was attending developmental kindergarten (known as "pre-kindergarten"). App. B2. Once Petitioner's teacher noticed the pencils, she collected them and made an inquiry to the school administration. App. B3. Mrs. Walz attended the event as a chaperone and does not recall the exchange of any wrapped gifts at that party.

Ultimately, Dr. Leonard Kelpsh, the Superintendent of the Respondent's schools, was contacted regarding distribution of the proselytizing pencils and concluded that Petitioner should distribute the pencils at a different time

and location based upon the items' lack of neutrality, the closed nature of a school, the potential for parents to misconstrue the message contained on the pencils as school sponsored and the availability of other locations in or at the elementary school for distribution. App. B3, B8. Moreover, other items with endorsements were not allowed to be distributed in class during school hours, including items with political, commercial or religious references. App. A3; App. B16. According to Dr. Kelpsh, the school's job was to develop curriculum, not endorse a particular view. Under the policy, a student would not be allowed to distribute pencils that stated "Home Depot" or "Support the New Jersey Education Association." *Id.*

In 1998, Mrs. Walz's daughter returned from a local event with a copy of the evangelical story, "A Candy Maker's Witness." App. B4-B5. The story is overtly religious and attributes religious significance to the candy cane. *See* App. B5-B6, n.2. Mrs. Walz entered the story into her computer, printed out copies of it, purchased candy canes separately, affixed the evangelical story to the candy canes with a ribbon and placed them in a basket. App. B4. Mrs. Walz chose the message because it was symbolic of the Christian holiday and attributed religious significance to the candy cane. *Id.*; App. A5. Mrs. Walz provided Petitioner with the candy canes to which she attached the evangelical story for distribution at a school sponsored winter party for kindergarten children in December 1998. App. B4-B5 At that time, Petitioner was just over 5 years old and his classmates were approximately the same age. *Id.* Prior to the event, Mrs. Walz contacted the school regarding distribution of the evangelical candy canes and was informed that Petitioner could distribute such before school, during recess or after school, but not inside the classroom. *Id.*; App. A5. Ultimately,

Petitioner was permitted to distribute the candy canes with the proselytizing message in the elementary school hallway. App. B5; App. A5.

The third event raised in Petitioner's Complaint transpired in December of 1999 during a school sponsored in-class activity for first grade children, a winter party. App. B7. Again, Mrs. Walz contacted the school regarding distribution of the evangelical candy canes and was informed that Petitioner could distribute such before school, during recess or after school, but not inside the classroom. *Id.*; App. A5. In fact, Petitioner distributed the evangelical candy canes in the hallway of the school. App. B7; App. A5. Mrs. Walz stated that the items distributed during the December 1999 event where generic in nature. *Id.* Petitioner has not been prevented from handing out items promoting his religious ideologies in the hallways of his elementary school or during recess. *Id.*

According to Dr. Kelpsh, the in-class seasonal activities were intended to promote sharing and caring among students, to develop social skills, and to learn about talking in turn in a large group. App. B16; App. B19. Children were taught important social skills at the parties and were not permitted to freely walk around or talk at will. App. B19.

The age or maturity of the students also played a part in Dr. Kelpsh's decisions regarding in-class distribution of items endorsing or promoting particular ideals or individuals for two reasons: (1) he questioned whether Petitioner, a very young child, decided or understood what it meant to promote such religious beliefs and whether this was the parent attempting to impose such beliefs upon other students in the classroom environment; and (2) the ability of other students

to understand that communication as solely made by another student and not endorsed by the school in the context of in-class distribution.

Petitioner presented no facts to contradict Respondent's evidence that the school took affirmative steps to regulate the items distributed at each in-class activity. App. B16. In accordance with the Respondent's general policy regarding collection and distribution of items at the seasonal parties, in or around December 1999, the local Parent Teacher Organization ("PTO") sent instructions home to parents which provided a list of "do's and don't's" for the upcoming in-class winter party. App. B7, n.3; App. B7-8; App. A5. Notably, the "Don'ts" listed in the notice include "Don't forget to keep the parties as generic as possible." Further, the instructions make clear that "gifts" were to be provided to the PTO which would distribute the gifts at the event. App A2; App. B7; App. A5. Parents and children generally would respond to the requests with generic donations. App. A2. Notably, students were not asked to bring in gifts with their favorite seasonal message. App. B16. Mrs. Walz could not identify any gift containing a non-religious message which was distributed during any of the in-class school sponsored events. App. B8; App. A5-6.

According to Dr. Kelpsh, direct gifts from students were discouraged because of the economic diversity of the community, the economic strain it would cause some students, and the potential distress caused to those who could not afford to participate. App. B7-B8. Dr. Kelpsh explained that:

> Socially, economically, [our student body is] very diverse, and we just don't like to take the risk that, one, kids would see other kids doing it

> and feel they have to do it, and they can't afford to do it; and two, you know, sometimes kids don't get everyone something in class.

App. A2.

Although unwritten, the above policy is communicated orally by the administration to teachers who disseminate the information to other teachers, parents and students. App. B8.

The Third Circuit and Federal District Court for the District of New Jersey relied upon the above facts in support of their decisions.

REASONS TO DENY THE PETITION

I. THE THIRD CIRCUIT COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THE SEVENTH CIRCUIT

Petitioner's claim of conflict among the Third and Seventh Circuits rests upon the unsupported factual contention, rejected by the Courts below, that Respondent engaged in unlawful viewpoint discrimination against Petitioner's religious speech. App. B15-16 ("The school's regulation of [Petitioner's] speech was viewpoint neutral"); *see also,* App. A15-16 and A19; App. B15-16. Further, Petitioner incorrectly asserts that "it is undisputed that the only reason Respondents refused to allow [Petitioner] to distribute his gifts was because they included religious messages [and] . . . [Petitioner's] classmates were permitted to distribute generic gifts inside the classroom at the same time." In fact, Petitioner offered "no proof that other children were allowed to disseminate messages in class or at in-class, school sponsored parties" and conceded that the gifts he

claims were distributed by other children were generic in nature. App. B16; *see also* App. A6 and App. B7. Petitioner also conceded that no other religion was treated more favorably than his own. *Id.*

Viewpoint discrimination is a form of content discrimination which occurs when the government targets not the subject matter, but the particular views taken by the speaker on a subject. *See Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). Moreover, that the Respondent provided other alternatives for Petitioner to distribute proselytizing items on school premises is evidence that the Respondent's decisions were not based on animus to Petitioner's religious beliefs, but to the particular mode of expression under the particular circumstances. App. A18; *see Walker-Serrano v. Leonard*, 325 F.3d 412, 419 (3rd Cir. 2003), *cert. denied*, 123 S. Ct. 2077 (2003); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 689 (1986) ([T]here is no suggestion that school officials attempted to regulate [Petitioner's] speech because they disagreed with the views [he] sought to express. Nor does this case involve an attempt by school officials to ban written materials they consider "inappropriate" for [elementary] school students, or to limit what students should hear, read, or learn about.)

Petitioner relies upon two Seventh Circuit opinions in support of a claimed conflict, *Hedges v. Wauconda Community Unit School District*, 9 F.3d 1295 (7th Cir. 1993) and *Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7th Cir. 1996), *cert. denied*, 520 U.S. 1156 (1997). Both cases are distinguishable on their facts, the law, or otherwise reconcilable with the opinions of the Third Circuit.

In *Hedges v. Wauconda Community Unit School District*, *supra*, the Seventh Circuit held that a school policy which specifically prohibited distribution of materials with religious content in the school's hallways violated a junior high school student's First Amendment rights. 9 F.3d at 1297-98. The Seventh Circuit recognized the significant difference between the government's lawful ability to prohibit certain categories of speech and the unlawful viewpoint discrimination embodied by a policy which specifically targeted material containing religious information. *Id.* at 1298 ("Even when government may forbid a category of speech outright, it may not discriminate on account of a speaker's viewpoint.") Notably, the Court recognized that schools are typically closed forums wherein most daily activities are strictly regimented especially during class when students discuss subjects of the school's devising and not of their own preference. *Id.* at 1301. As a result, the Court determined that limiting distribution to a designated place and prohibiting distribution of material primarily prepared by non-students was not unlawful. *Id.*[1]

In a comparable case, *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3rd Cir. 2001) the Third Circuit reached a result similar to that of the Seventh Circuit in *Hedges*. Reversing the lower court, the Third Circuit agreed with the students' First Amendment challenge to an overly broad school district anti-harassment policy which prohibited, *inter alia*, unwelcome verbal conduct which offends an individual based upon their sexual orientation. The plaintiffs in *Saxe*

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1. Although Petitioner argues that the policy in *Hedges* governed elementary and junior high school students, the Seventh Circuit's subsequent opinion in *Muller* recognized that "the environment of an elementary school was not at issue in [*Hedges*]". *Muller*, 98 F.3d at 1538.

were devout Christian students who successfully argued that the policy prohibited them from expressing their religious belief that homosexuality is a sin. *Id.* at 203, 218. Applying the standards set forth in *Tinker* and its progeny, the Third Circuit concluded that the policy went beyond permissible restrictions and was overbroad. *Id.* at 216-17.

In addition to the lack of any actual conflict among the Seventh and Third Circuits based upon the *Hedges* decision, *Hedges* and *Saxe* are distinguishable from this case at several levels: neither case involved distribution of proselytizing items during *in-class* school sponsored pre-kindergarten, kindergarten and first grade instructional events. Moreover, on the day of the latter two events, Respondent provided Petitioner with on-premises alternatives for distribution of the candy canes with the attached religious messages. Accordingly, the decision in *Hedges* is not analogous to Petitioner's case.

Similarly, no conflict between the Circuits exist based upon the Seventh Circuit's opinion in *Muller*, *supra*. In *Muller,* the Seventh Circuit addressed application of a school district's general policy which regulated the time and location of literature distribution to an elementary student's circulation of invitations to a religious meeting. 98 F.3d at 1532. Upholding the policy, two members of the three judge panel agreed that the applicable test "is whether the restrictions on student expression are 'reasonably related to legitimate pedagogical concerns.'" *Id.* at 1540 and 1545 (citing *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 267 (1988)). Upholding the distribution limitations and nonpublic fora conclusions reached in *Hedges*, the *Muller* Court found the *Hazelwood* test consistent with *Tinker v. Des Moines Independent Com. Sch. Dist.*, 393 U.S. 503 (1969). *Id.* at 1540.

Assuming, *arguendo*, that Petitioner's understanding of *Muller* is correct, Petitioner recognizes that *Muller* does not resolve the issue within the Seventh Circuit. Pet'r['s] Br. pp. 12-13. At most, *Muller* establishes that the issue of whether *Tinker* applies in the elementary school setting remains unresolved within that Circuit. Hence, Petitioner's reliance upon *Muller* as a basis to contend that a conflict among the Seventh and Third Circuits is misplaced.[2] Moreover, two members of the three judge panel applied the same analytical framework in *Muller* as applied by the Third Circuit in this case.

Petitioner's failure to establish facts supporting his claim of viewpoint discrimination before the Courts below, combined with facts establishing the lack of such discrimination, undermines a key presumption relied upon in support of Petitioner's prayer for the issuance of a Writ granting Certiorari. In short, no conflict exists among the Third and Seventh Circuits which warrants issuing a Writ of Certiorari.

II. THE THIRD CIRCUIT APPLIED THE APPROPRIATE FIRST AMENDMENT ANALYSIS WHICH IS BASED UPON ESTABLISHED LEGAL PRINCIPALS APPLICABLE IN THE PARTICULAR CONTEXT.

The Third Circuit's analysis followed a recognized framework and applied established legal principals to the particular facts before the Court. Petitioner's attempt to

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2. Unlike the *Muller* case, the type of forum and concomitant analysis is not an issue in this case since the Petitioner conceded that the forum was a nonpublic forum which, in turn, dispensed with the need for an exhaustive analysis of *Tinker*. App. B11-12; App. B12, n.4.

disparage the opinion of the Court as incomprehensible or divergent from established legal principles, as well as Petitioner's blunderbuss claim of confusion regarding the framework applicable in such cases, is unfounded.

The Third Circuit's analysis specifically recognized the basic proposition announced in *Tinker* and developed by its progeny: "while school students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,' a school's need to control student behavior will necessarily result in limitations on student speech." App. A9 (citing *Tinker, supra*); *see also Tinker,* 393 U.S. at 506 (1969) (The free speech rights of students must be "applied in light of the special characteristics of the school environment."); *Lee v. Weisman*, 505 U.S. 577, 592 (1992); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (The rights of students to express themselves at school are not coextensive with the rights of adults to express themselves in other settings. "[Instead,] there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). *Tinker* held that the non-disruptive expression by high school students which occurred outside the context of school sponsored activities was protected under the First Amendment. In particular, *Tinker* centered upon a school's prohibition which singled out a particular form of symbolic speech because of its political viewpoint even though it did not "intrude upon the work of the schools or the rights of other students." 393 U.S. at 508, 510 and 514. Recognizing the distinctions raised within *Tinker* and its progeny, including the nature of the in-class school sponsored

activities and the closed nature of the forum, the Third Circuit applied the *Hazelwood* framework.[3]

A review of the underlying legal principals in conjunction with its analysis establishes that the Third Circuit's application of *Hazelwood* was correct.[4] Activities which are supervised by school faculty and designed to impart particular knowledge or skills to student participants are fairly characterized as part of the curriculum, may be reasonably perceived as bearing the imprimatur of the school[5] and, accordingly, fall within the purview of a school's authoritative control. *Hazelwood*, *supra,* 484 U.S. at 271; App. A11, A14 and A19. It is irrelevant whether or not the activities occur in a traditional classroom setting. *Id.* Further, the continued exercise of supervision and control over the activity supports the conclusion that it is part of the curriculum. *Id.* at 268-270. In this context, educators maintain greater control over student expression to assure that

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3. Petitioner conceded that the pre-kindergarten, kindergarten and first grade classrooms were nonpublic fora. App. B11-12. As a result, forum analysis and discussion of the non-applicability of limited public forum cases was unnecessary. App. B12, n.4.

4. In *Hazelwood,* the school maintained control over articles which appeared in a school newspaper that were written and edited by high school students as part of a journalism class. *Hazelwood*, *supra,* 484 U.S. at 262. The Petitioners claimed a violation of their First Amendment rights when administrators removed two stories, one that addressed student pregnancy and another regarding the impact of divorce on students, prior to printing the paper. *Id.* at 263-64.

5. A court is not required to determine with certainty that dissemination of particular material would be construed as an endorsement by the school. *Hazelwood, supra*, 484 U.S. at 272.

participants learn the lessons the activities are designed to teach, that [recipients of the message] are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. *Id.* at 271-72; App. A11. School officials are given wide latitude in choosing which educational values to emphasize and the means through which those values are promoted by them. *See Poling v. Murphy*, 872 F.2d 757, 762-63 (6th Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990). Educators do not violate the First Amendment by exercising control over student speech in expressive activities provided it is reasonably related to legitimate pedagogical concerns. *Id.* at 273;[6] App. A11 and A19.

Legitimate pedagogical concerns include taking into account the maturity level of the intended audience in determining whether to disseminate student speech on potentially sensitive topics. *Id.* at 272; *Tinker*, *supra*, 393 U.S. at 515 ("[A governmental actor] may permissibly determine that, at least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice which is the presumption of First Amendment guarantees.") (Stewart, J., concurring); *DeNooyer v. Livonia Public Schools*, 799 F. Supp. 744 (E.D. Mich. 1992), *aff'd*, 12 F.3d 211 (6th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Bell v. Little Axe Independent School District No. 70*, 766 F.2d 1391 (10th Cir. 1985); App A11-13. Additionally, public school is intended to instill learning and prepare children for meaningful lives and citizenship. *See Zykan v. Warsaw Com. Sch. Corp.*, 631 F.2d 1300, 1304

6. As noted above, the analytical framework developed in *Hazelwood* was accepted as the appropriate framework by two members of the three judge panel in *Muller, supra.*

(7th Cir. 1980). Accordingly, the age of the student bears an important inverse relationship to the degree and kind of control a school may exercise. *See Sch. Dist. v. Schempp,* 374 U.S. 203, 290-91 n.69 (1963) (Brennan, J., concurring); *Fraser, supra,* 478 U.S. at 683-85; *Muller, supra*, 98 F.3d at 1539-40 (citations omitted) (Concluding school could preclude a grammar school student from distributing invitations to a religious meeting in his fourth grade classroom reasoning that an elementary school "may restrict such speech that could crush a child's sense of self-worth."); *see also Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (Noting that elementary school children "are impressionable and their [attendance] at school is involuntary."); App. A8-A10.

The Third Circuit applied the above analytical framework and legal principals to the following facts: (1) Petitioner's proselytizing occurred during classroom activities that had a clearly defined curricular goal which included teaching social skills, respect for others and sharing (App. A16 and A17); (2) each event was highly structured, supervised and regulated (App. A17); (3) based upon the tender age of the students, the school generally prohibited the exchange of gifts that promoted a specific message (App. A16); and (4) several factors demonstrated the school's continual control over each event including the teacher's role in planning the events, the PTO's control over gift collection as well as distribution, and the directive of generic gifts (App. A17).

The Court also relied upon the fact that the stated purpose of Petitioner's mother "was to promote a religious message through the channel of a benign classroom activity." App. A19. It is axiomatic that there is no stronger association with a school than activities which occurs inside a classroom.

The fact that each event occurred in the classroom during school hours, at a school sponsored event, lends further support for the conclusion that the Respondents properly requested Petitioner to distribute his proselytizing items in areas outside of the classroom. As noted by the District Court, "if the [Respondents] had made an exception to the policy, to permit [Petitioner's] religious messages while precluding others, the possibility is real that a reasonable observer would perceive the [Respondents] as endorsing this religious message." App B23, n.10 (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 605 (1989)).

Petitioner's bare argument that if in-class events constitute an "organized curricular activity" then it is difficult to imagine any activities at the elementary school level outside of that description is not only an over exaggeration, it ignores the practical educational environment of a pre-kindergarten, kindergarten and first grade class recognized by the Courts below. Pet'r['s] Br. p. 19. Elementary grade school children do not attend a traditional four hour lecture style class at this developmental stage in their education. Additionally, Petitioner did not explain the basis for, and provided no credible evidence to support, the contention that the pre-kindergarten, kindergarten and first grade in-class events do not squarely fit within the types of activities described in *Hazelwood*.

Petitioner's reliance upon *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) is misplaced. That case involved a religious club which sought access to the school's limited open forum created by the school board's policy. The risk of the perception that the board endorsed a student religious club was not supported by the facts because the activities occurred after school hours, the activities were

presented by individuals who were not faculty members, and student attendance was not mandatory. Most importantly, in *Good News Club*, parental permission was required, the children-participants were not all the same age, the activities would take place in a combined high school resource and middle school special education room, not in an elementary school classroom, and there was no oversight by teachers.

Contrary to Petitioner's argument, the Third Circuit has not obliterated all First Amendment rights of elementary students. App. A14, n.4 ("While an elementary school deserves greater discretion to control its curricular activities, individual student expression still may be appropriate depending on the context"); App. A18 ("As noted, elementary school students retain certain First Amendment rights of expression."); App. A18-19 ("*And* where the school solicits individual views in a classroom assignment, students should be able to respond in a non-disruptive manner.") (emphasis added); *Walker-Serrano v. Leonard*, 325 F.3d 412, 416, 417 (3rd Cir. 2003) ("That the First Amendment protects student expression within schools is beyond challenge . . . That age is a factor in this calculus does not necessarily mean that third graders do not have First Amendment rights under *Tinker*. *Tinker* provides a flexible standard that arguably is able to incorporate these considerations")[7] Moreover, the Court concluded that as to the distribution of the candy cane story, there was no deprivation of Petitioner's First Amendment rights. App A18.

Petitioner contends that Third Circuit's opinions in *Walker-Serrano v. Leonard*, *supra*, and *S.G. v. Sayreville*

7. In *Walker-Serrano*, neither party urged the court to consider the case under *Hazelwood* or *Fraser*, 325 F.3d at 416.

Bd. of Ed., 333 F.3d 417 (3rd Cir 2003), *cert. denied*, 124 S. Ct. 1040 (2004) establish that the Third Circuit does not recognize any meaningful First Amendment protection for elementary school students. Pet'r['s] Br. p. 23. Contrary to Petitioner's claim, the Court's opinion in *Walker-Serrano* did not strip elementary students of their First Amendment rights. 325 F.3d at 418 ("In any event, we see no reason at this point to conclude that, as a general matter, these concerns cannot be addressed under the case-by-case approach specified in *Tinker*.") Instead, the Court applied established legal doctrine which recognizes, *inter alia*, the significance of certain practical realities: age bears an inverse relationship to a student's First Amendment rights in a school environment. *Id.* at 416. The Court recognized that, in an elementary school setting, such rights must be counterbalanced by the proscription against interfering with the rights of other young students, the potential for subtle coercion and valid parental prerogatives established by *Tinker* and subsequent decisions. *Id.* at 418-420. Most importantly, the third grade student in *Walker-Serrano* occasioned no constitutional harm: the school encouraged other expressions of the student's opposition to the field trip, permitted distribution of other materials, including coloring books and stickers, which expressed the student's views and she was not disciplined for circulating the petition or prevented from obtaining permission to circulate the petition at a different time or location. *Id.* at 419.

Against a backdrop of three incidents involving violent statements made by students which involved reference to firearms and a horribly tragic nationally publicized incident of a six year old child shooting another, the Third Circuit upheld a school's discipline of a student for stating to another student that "I'm going to shoot you." *S.G. v. Sayreville Bd.*

of Ed., 333 F.3d 417 (3rd Cir 2003), *cert. denied*, 124 S. Ct. 1040 (2004). The contemporaneousness of the events played a key role in its decision. Nonetheless, the Court did not dismiss the First Amendment in a perfunctory manner. Rather, the Third Circuit recognized that the freedom to advocate unpopular views in school must be counterbalanced against society's interest in teaching students socially appropriate behavior. *Id.* at 421, 422.

A student's First Amendment rights continue to have meaningful value in the Third Circuit. *See Sypniewski v. Warren Hills Regional Bd. of Ed.*, 307 F.3d 243 (2002), *cert. denied*, 123 S. Ct. 2077 (2003). In *Sypniewski*, the Third Circuit overturned a District Court decision where a student was prohibited from wearing a T-Shirt because it contained language generally similar to that banned by the school board's policy. *Id.* at 254-57. Although the school's concern arose because of a history of racial tensions and recent threats of violence, the Court required significantly more than a mere general similarity among the terms association with white supremist gang activity which were banned and a somewhat related term contained on the student's T-Shirt. *Id.* Absent significantly stronger proofs, the Court refused to apply *Tinker's* proscription against expression that interferes with school operations or the rights of others. *Id.*

The foregoing establishes that the Third Circuit's analysis and application of *Hazelwood* does not represent a substantial departure or unwarranted extension of First Amendment jurisprudence nor the elimination of First Amendment rights in the elementary school context.

CONCLUSION

For all of the foregoing reasons, Respondents Egg Harbor Township Board of Education and Superintendent Dr. Leonard Kelpsh pray that the Court denies Petitioner's request for the issuance of a Writ of Certiorari.

Respectfully Submitted,

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